Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

C.E. and L.E.,

Petitioners,

v.

ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

PETITION FOR A WRIT OF CERTIORARI

JOHN B. LOWER
General Counsel
WILLIAM E. COFFIN
Counsel of Record
JEFFREY M. PLESKO
Illinois Guardianship and Advocacy Commission
160 North LaSalle Street
Suite S-500
Chicago, Illinois 60601
(312) 793-5908

Counsel for Petitioner C.E.

MARK B. EPSTEIN
Epstein & Epstein
134 North LaSalle Street
Suite 2106
Chicago, Illinois 60602
(312) 782-3193

Counsel for Petitioner L.E.

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

I. Can a state's *parens patriae* interest outweigh a person's fundamental right to refuse psychotropic medication when that person has a mental illness or developmental disability and lacks decisional capacity but poses no threat of harm?

II. Does a state violate the guarantee of equal protection by creating two disparate judicial procedures to make treatment decisions for persons who lack decisional capacity?

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C.E. and L.E. respectfully petition for a writ of certiorari to review the judgment of the Illinois Supreme Court in this case.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported at 161 Ill. 2d 200, 641 N.E.2d 345 (1994). It has been reprinted and attached hereto as Appendix A. The opinion of the Circuit Court of Cook County, Illinois, is unreported. It has been reprinted and attached hereto as Appendix B.

JURISDICTION

The Illinois Supreme Court entered its judgment on May 19, 1994. On October 3, 1994, the Court entered an order denying C.E.'s Petition for Rehearing. That order is attached hereto as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV.

Section 2-107.1 of the Illinois Mental Health and Developmental Disabilities Code:

Psychotropic medication may be administered to a recipient of services against his will under the standards and procedures of this Section:

(a) Any person 18 years of age or older, including any guardian, may petition the circuit court for an order authorizing the administration of psychotropic medication to a recipient of services.

(b) The court shall hold a hearing within 30 days of the filing of the petition.

(c) Unless otherwise provided herein, the procedures set forth in Article VIII of Chapter 3 of this Act, including the provisions regarding appointment of counsel, shall govern hearings held under this Section.

(d) Psychotropic medication shall not be administered to the recipient unless it has been determined by clear and convincing evidence that all of the following factors are present:

(1) That the recipient has a serious mental illness or developmental disability.

(2) That because of said mental illness or developmental disability, the recipient exhibits deterioration of his ability to function, suffering, or threatening or disruptive behavior.

(3) The illness or disability has existed for a period marked by the continuing presence of the symptoms set forth in paragraph (2) of subsection (d) of this Section or the repeated episodic occurrence of these symptoms.

(4) That the benefits of the psychotropic medication will outweigh the harm.

(5) That the recipient lacks the capacity to make a reasoned decision about the medication.

(6) That other less restrictive services have been explored and found inappropriate.

(e) In no event shall an order issued under this Section be effective for more than 90 days. However, psychotropic medication may be administered for additional 90-day periods without limitation under hearings that comply with the above standards and procedures of this Section.

(f) An order issued under this Section shall designate the persons authorized to administer the psychotropic medication under the standards and procedures of this Section.

(g) A guardian shall only be authorized to consent to the administration of psychotropic medication under the standards and procedures of this Section.

(h) Nothing in this Section shall prevent the administration of psychotropic medication to recipients in an emergency under Section 2-107 of this Act. 405 ILCS 5/2-107.1 (West 1992).

STATEMENT OF THE CASE

C.E., a legally competent adult, was named the respondent in a petition for the involuntary administration of psychotropic medication. If the Circuit Court of Cook County, Illinois, had granted that petition, C.E. would have been denied his right to refuse unwanted, non-emergency medical treatment. He seeks to have declared unconstitutional Section 2-107.1 of the Illinois Mental Health and Developmental Disabilities Code (hereinafter "the Code") which authorizes the entry of a court order for the involuntary administration of psychotropic medication to certain persons with mental illnesses or developmental disabilities.

Psychotropic Medication

As defined by the Code, psychotropic medications are any drugs which are used for "antipsychotic, antidepressant, antimanic, antianxiety, behavioral modification or behavioral management purposes." 405 ILCS 5/1-121.1 (West 1992). Although Section 2-107.1 permits the involuntary administration of any of the myriad of psychotropic medications, most litigation in this area has focused on one subgroup of psychotropic medications—antipsychotic medications.

Antipsychotic medications are mind-altering drugs. *Mills v. Rogers*, 457 U.S. 291, 293 n.1 (1982). They "alter the chemical balance in a patient's brain, leading to changes,

intended to be beneficial, in his or her cognitive processes." *Washington v. Harper*, 494 U.S. 210, 229-230 (1990). Some of the cognitive changes brought on by antipsychotic medications, however, may not be beneficial. Antipsychotic drugs can cause sedation and confusion, thereby hindering concentration. *Riggins v. Nevada*, 112 S. Ct. 1810, 1816 (1992). They may also "undermine the foundation of personality," *In the Matter of Guardianship of Roe*, 383 Mass. 415, 437, 421 N.E.2d 40, 53 (1981), decreasing "the desire for self-preservation" and "imposing constraints on the [patient's] own will." *Riggins*, 112 S. Ct. at 1819-1820 (Kennedy, J., concurring).

Antipsychotic drugs can attack the patient's physical being, as well, causing "serious, even fatal, side effects." *Harper*, 494 U.S. at 229. The drugs' effects on the autonomic nervous system include postural hypotension, dry mouth, nasal congestion, nausea, blurred vision, constipation, and, in men, retrograde ejaculation which may lead to impotence. Their effects on the central nervous system include dystonic reactions (severe muscle spasms in the upper body, tongue, throat, or eyes), pseudoparkinson reactions (diminished range of facial expression, tremors, stooped posture, and shuffling gait), and akathisia (an inner-driven restlessness which may lead to rhythmic leg-jiggling or agitated, hand-wringing pacing). *See Harper*, 494 U.S. at 229-230 and 240 (Stevens, J., dissenting); *Riggins*, 112 S. Ct. at 1819-1820 (Kennedy, J., concurring).

Antipsychotic drugs can cause tardive dyskinesia, a potentially irreversible syndrome of involuntary muscle movements. Its characteristic, and uncontrollable, movements include facial grimacing, lip puckering, tongue darting, pelvic thrusting, and any variety of arm, shoulder, and leg movements. According to this Court, "the evidence suggests that the proportion of patients treated with antipsy-

chotic drugs who exhibit the symptoms of tardive dyskinesia ranges from 10% to 25%." *Harper*, 294 U.S. at 230. Antipsychotic drugs can also cause neuroleptic malignant syndrome, a relatively rare condition, but one which can lead to death from cardiac dysfunction. *Harper*, 294 U.S. at 229.

Because of the "well-established likelihood of severe and irreversible adverse side effects," some state and federal courts have found that psychotropic medications are as intrusive and as dangerous as electroconvulsive therapy or psychosurgery. *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984); *Roe*, 383 Mass. at 436, 421 N.E.2d at 53; *In re K.K.B.*, 609 P.2d 747 (Okla. 1980). Yet it is these medications which the State of Illinois, through the enactment of Section 2-107.1, seeks to forcibly administer to certain persons with mental illnesses or developmental disabilities—whether they are competent or incompetent, whether they are dangerous or not dangerous, whether they are inpatients, outpatients, or ex-patients,[1] and whether they like it or not.

Illinois's Statutory Right to Refuse Treatment and its Exceptions

In Illinois, adults, or their guardians, have long had a statutory right "to refuse generally accepted mental health or developmental disability services, including but not limited to medication." 405 ILCS 5/2-107 (West 1992). Until 1991, this statutory right had but two exceptions: (1)

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[1] Section 2-107.1 authorizes the involuntary administration of psychotropic medications to certain "recipients of services." A recipient of services is "a person who has received or is receiving treatment or habilitation" for a mental illness or a developmental disability. 405 ILCS 5/1-123 (West 1992). Treatment "includes, but is not limited to, hospitalization, partial hospitalization, outpatient services, examination, diagnosis, evaluation, . . . psychotherapy, [and] pharmaceuticals." 405 ILCS 5/1-128 (West Supp. 1993).

adults, who had been adjudicated incompetent and for whom guardians had been appointed, could not refuse treatment for themselves and (2) adults, who, in emergency situations, posed an immediate threat of serious physical harm to themselves or others, could not refuse treatment. *In the Matter of Orr*, 176 Ill. App. 3d 498, 531 N.E.2d 64 (4th Dist. 1988).

On August 13, 1991, Section 2-107.1 of the Code became effective and created a third exception to the right to refuse. Section 2-107.1 authorizes the entry of a court order for the administration of psychotropic medication to persons with mental illnesses or developmental disabilities—despite their refusal—upon a showing, *inter alia*, that (1) the person "lacks the capacity to make a reasoned decision about the medication;" (2) the person "exhibits deterioration of his ability to function, suffering, or threatening or disruptive behavior;" and (3) "the benefits of the psychotropic medication will outweigh the harm." 405 ILCS 5/2-107.1 (West 1992).

Proceedings in the Trial Court

In late August 1991, C.E. was found to be subject to involuntary admission by the Circuit Court of Cook County and was ordered hospitalized for psychiatric treatment.[2] At

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[2] Section 1-119 of the Code defines "subject to involuntary admission" as follows:

> (1) A person who is mentally ill and who because of his illness is reasonably expected to inflict serious physical harm upon himself or another in the near future; or
>
> (2) A person who is mentally ill and who because of his illness is unable to provide for his basic physical needs so as to guard himself from serious harm.

405 ILCS 5/1-119 (West Supp. 1993).

a separate hearing that same day, C.E.'s father, L.E., was appointed his temporary guardian for the purpose of granting or withholding substituted informed consent for medical treatment, including psychotropic medication, for C.E.[3] Pursuant to Section 2-107.1, L.E. filed a petition requesting authority to consent to psychotropic medication which C.E. had refused. Soon thereafter, L.E. filed a Petition for Declaratory Relief, asking that Section 2-107.1 be declared unconstitutional. The Illinois Guardianship and Advocacy Commission, court appointed counsel for C.E., also filed a Petition for Declaratory Relief, asking that the statute be declared unconstitutional. The Office of the Illinois Attorney General filed an appearance on behalf of the Illinois Department of Mental Health and Developmental Disabilities and defended the statute's validity.

In March 1992, the trial judge granted C.E.'s and L.E.'s Petitions for Declaratory Relief and declared Section 2-107.1 unconstitutional on its face. Finding that the right to refuse treatment is a fundamental right and employing strict scrutiny, the trial judge held that Section 2-107.1 violates both state and federal constitutional guarantees of

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[3] *See* 755 ILCS 5/11a-3 (West 1992) (temporary guardian may be appointed "prior to the appointment of a [limited or plenary] guardian . . . upon a showing of the necessity therefor for the welfare and protection of the disabled person or his estate. . . . The temporary guardianship shall expire within 60 days after the appointment or whenever a guardian is regularly appointed, whichever occurs first.").

C.E. was not found to be incompetent. (Appendix B-29 and B-32) Neither an adjudication of being subject to involuntary admission nor the appointment of a temporary guardian constitutes an adjudication of legal incompetence. 405 ILCS 5/2-101 (West 1992) (judicial determination of incompetence "shall be separate from a judicial proceeding held to determine whether a person is subject to involuntary admission"). *See also* 755 ILCS 5/11a-12, 11a-14 (West 1992).

due process, equal protection, privacy, and freedom of religion. The Attorney General took a direct appeal to the Illinois Supreme Court.

Opinion of the Illinois Supreme Court

In May 1994, the Illinois Supreme Court reversed the trial court and upheld the validity of Section 2-107.1. The court found that persons have a liberty interest in refusing unwanted medical treatment which is protected by the Fourteenth Amendment to the United States Constitution, (Appendix A-10), and that the State has a competing and "significant *parens patriae* interest in providing for persons who, while suffering from a serious mental illness or developmental disability, lack the capacity to make reasoned decisions concerning their need for [psychotropic] medication." (Appendix A-15) Finding that Section 2-107.1 "bears an important and substantial relationship to the State's interest as *parens patriae*," (Appendix A-15), the court held that the statute "does not, on its face, impermissibly burden the Federal constitutional liberty interests of C.E." (Appendix A-17) The court cited no opinions from any jurisdiction which had allowed the State's *parens patriae* power to outweigh an individual's federal right to refuse treatment, and, despite C.E.'s entreaty to do so, the court did not determine whether the right to refuse is a fundamental right and did not specify the level of scrutiny employed.

Based on *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), C.E. and L.E. had argued that Section 2-107.1 is unconstitutional because it does not require use of the substituted judgment standard. Under this standard, if a patient is found to lack decisional capacity, a surrogate decision maker is appointed to effectuate the treatment decision that the incompetent patient would make if competent. The Illinois Supreme Court found that

a patient's "wishes, while competent, will often be very relevant to a determination of whether psychotropic substances should be administered." (Appendix A-21) Because Section 2-107.1 "permits the court's consideration of the substituted judgment" standard, (Appendix A-19), the court found "no error, under Federal constitutional law, in the legislature's failure to expressly include the substituted judgment test in section 2-107.1." (Appendix A-21) The court did not, however, discuss *Cruzan* and did not *require* use of the substituted judgment standard in hearings held pursuant to Section 2-107.1.

C.E. and L.E. had also challenged Section 2-107.1 as a violation of equal protection. They had argued that Section 2-107.1 hearings and guardianship hearings both accomplish the same end—making treatment decisions for persons who lack decisional capacity—but that they do so through disparate means: Section 2-107.1 hearings require fewer procedural protections than guardianship hearings.

The Illinois Supreme Court recognized that the guardianship statute's definition of a "disabled person"[4] "bears substantial similarity" to 2-107.1's requirement that respondents lack decisional capacity, (Appendix A-30), and then compared the procedures that these two groups of similarly situated persons receive under the two statutes. When making this comparison, however, the court ignored most of the differences between the two statutes articulated by C.E. and L.E. and mentioned only one—the appointment of a guardian. The court noted that "there is nothing in section 2-107.1 that prevents or prohibits the trial court from

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[4] A "disabled person" is one who, because of mental deterioration, physical incapacity, mental illness, or developmental disability is not fully able to manage his person or estate. 755 ILCS 5/11a-2 (West Supp. 1993).

appointing a guardian . . . if the trial court believes such appointment would serve the mental health recipient's interests." (Appendix A-30) "We cannot say that section 2-107.1 is unconstitutional for its failure to explicitly *require* such guardianship appointments in all instances." (Appendix A-31)

Upholding the statute's validity, the court reversed the judgment of the trial court and, because no hearing had yet been held on the original petition for involuntary medication, remanded the cause "for further proceedings consistent herewith." (Appendix A-31) C.E. filed a timely Petition for Rehearing, asking, *inter alia*, for guidance regarding the discretionary use of substituted judgment. That Petition for Rehearing was denied on October 3, 1994. (Appendix C-1)

Jurisdiction

Although the Illinois Supreme Court remanded this case to the Circuit Court for further proceedings, its judgment is final regarding the federal issues raised. Thus, this Court may exercise its jurisdiction in this case despite the remand.

In *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), this Court outlined four categories of cases in which this Court may exercise its jurisdiction without awaiting the completion of proceedings pending in the lower court.

> [In one] category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the outcome of the case.

Cox, 420 U.S. at 481.

In the present case, regardless of who prevails on the non-federal issues to be decided by the Circuit Court, this

Court will have no second opportunity to review the federal issues. This Court has jurisdiction to review only decisions of the Illinois Supreme Court, not decisions of the Circuit Court, and res judicata would bar C.E. from relitigating the federal issues in the Illinois Supreme Court.

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue . . .

Cox, 420 U.S. at 482-483.

In the present case, if this Court exercises its jurisdiction now and reverses the Illinois Supreme Court's decision on federal grounds, there would be no further litigation, and C.E.'s right to refuse treatment would be upheld. On the other hand, if this Court declines to exercise its jurisdiction, the federal policy of protecting an individual's right to refuse treatment—a policy recognized in *Harper*, *Cruzan*, and *Riggins*—could be seriously eroded, not just for C.E., but for countless individuals falling under the purview of Section 2-107.1 and similar statutes from states across the country.

REASONS FOR GRANTING THE PETITION

I.

IN *MILLS v. ROGERS*, THIS COURT GRANTED CERTIORARI TO ESTABLISH SUBSTANTIVE DUE PROCESS STANDARDS FOR REVIEWING CHALLENGES TO THE INVOLUNTARY ADMINISTRATION OF PSYCHOTROPIC MEDICATION, BUT THIS COURT HAS NOT YET ESTABLISHED THOSE STANDARDS FOR PERSONS WHO ARE NOT IMPRISONED, AND, LACKING GUIDANCE, THE CIRCUIT COURTS OF APPEALS ARE IN CONFLICT REGARDING THIS IMPORTANT FEDERAL ISSUE.

In 1981, this Court granted certiorari to determine "whether an involuntarily committed mental patient has a constitutional right to refuse treatment with antipsychotic drugs." *Mills v. Rogers*, 457 U.S. 291, 298 (1982). If such a right existed, the parties asked the Court to determine whether it was fundamental and to identify conditions under which it could be outweighed by competing State interests. *Mills*, 457 U.S. at 299. This Court, however, did not make the requested determinations. Instead, the case was remanded to the Circuit Court of Appeals and was decided there solely on the basis of state law. *Rogers v. Okin*, 738 F.2d 1 (1st Cir. 1984). More than a decade later, most of the federal questions raised in *Mills* remain unanswered and are the subject of continuing debate by legal, and medical, experts. *See* Cichon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 La. L. Rev. 283 (1992). The present case affords this Court the opportunity to clarify the relative importance of the individual's right to refuse treatment and the State's duty to provide treatment to persons with mental illnesses and developmental disabilities.

On the same day that *Mills* was remanded, this Court decided *Youngberg v. Romeo*, 457 U.S. 307 (1982). In *Youngberg*, this Court held that an adult with profound

mental retardation, who had been involuntarily committed to a state institution, retained a liberty interest in being free from unreasonable physical restraints. Physical restraints would be unreasonable, and therefore unconstitutional, however, only if the decision to use them was "a substantial departure from accepted professional judgment." *Youngberg*, 457 U.S. at 323.

Although *Youngberg* addressed the use of physical restraints for persons with mental retardation, some federal courts used *Youngberg*'s professional judgment standard to review the use of involuntary medication for persons with mental illnesses. Without identifying the weight of the individual's right to refuse, but using terms associated with the rational or reasonable basis test of minimum scrutiny, some courts have given the states' mental health professionals broad discretion to involuntarily medicate their patients. *See e.g. Dautremont v. Broadlawns Hospital*, 827 F.2d 291, 300 (8th Cir. 1987) (involuntary patient's "liberty [interest in refusing medication] is outweighed . . . by the government's legitimate objective to return [his] behavior to that which is acceptable to society and by the professionals' reasonable judgment . . . that that objective can best be accomplished by the administration of . . . psychotherapeutic drugs"); *Johnson v. Silvers*, 742 F.2d 823, 825 (4th Cir. 1984) (" 'the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.' ") (quoting *Youngberg*, 457 U.S. at 321.)

Distinguishing *Youngberg*, and using terms associated with strict scrutiny, other federal courts have given more weight to the individual's interest and less discretion to the states' officials. For example, the Tenth Circuit held that the right to refuse is fundamental. *Bee v. Greaves*, 744 F.2d

1387 (10th Cir. 1984). As a result, the Court permitted the involuntary administration of antipsychotic medications to pre-trial detainees only in emergency situations and only after less restrictive alternatives had been ruled out. The Tenth Circuit distinguished *Youngberg* because that case "involved temporary physical restraints rather than mental restraints [i.e., antipsychotic medications] with potentially long term effects." *Bee*, 744 F.2d at 1396 n. 7. *See also Rennie v. Klein*, 653 F.2d 836, 843-844 (3d Dist. 1981) (right to refuse is fundamental), *vacated*, 458 U.S. 1119 (1982), *reaffirmed on remand*, 720 F.2d 266, 269 (3d Cir. 1983) (antipsychotic drugs may be constitutionally administered over the objection of an involuntary patient only when "necessary to prevent the patient from endangering himself or others").

Thus, as the Seventh Circuit has recently noted, the opinions from the Circuit Courts of Appeals are "conflicting," and the contours of the constitutional right to refuse psychotropic medication have never been "clearly established." *Sherman v. Four County Counseling Center*, 987 F.2d 397, 408 (7th Cir. 1993).

In 1990, this Court issued two opinions regarding the right to refuse medical treatment, but neither opinion answered the questions first raised in *Mills*. In *Washington v. Harper*, this Court held that an incarcerated felon has a "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Washington v. Harper*, 494 U.S. 210, 221 (1990). "Given the requirements of the prison environment," however, the Due Process Clause permits the State to administer antipsychotic medications to the inmate, against his will, if he is dangerous and if the treatment is in his medical interests. *Harper*, 494 U.S. at 227. *Harper* verified the existence of

the right to refuse. It did not, however, determine whether the right to refuse is fundamental, and it did not determine which State interests, outside the prison setting, could outweigh the individual's interest.

Harper did little to eliminate the confusion existing in the Courts of Appeals regarding the rights of non-prisoners to refuse psychotropic medication, and this Court's other 1990 opinion may have added to the confusion. In *Cruzan v. Director, Missouri Department of Health*, this Court addressed the right of an incompetent adult to refuse life-sustaining treatment. In so doing, this Court explicitly declined to rely on *Youngberg*, distinguishing *Youngberg* because it "did not deal with decisions to administer or withhold medical treatment." *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 279 (1990). As noted above, however, some lower courts have relied on *Youngberg*'s professional judgment standard when reviewing the right to refuse psychotropic medication. After *Cruzan*, the continuing validity of those opinions is questionable.[5]

Thus, this Court has not yet determined the level of judicial scrutiny to be employed when persons other than incarcerated felons allege a violation of their right to refuse psychotropic medication, *see Riggins v. Nevada*, 112 S. Ct. 1810, 1815 (1992) ("we have not had occasion to develop substantive standards for judging forced administration of [antipsychotic] drugs in the trial or pre-trial settings . . . [and] we have no occasion to finally prescribe such substan-

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[5] At least one district court has rejected *Youngberg*'s professional judgment standard, based, in part, on *Cruzan*. *See Woodland v. Angus*, 820 F. Supp. 1497, 1509 n. 13 (D. Utah 1993) (state hospital policy authorizing involuntary administration of psychotropic drugs for patient's "medical interests and in accordance with prevailing standards of medical practice" held unconstitutional).

tive standards [in this case]"), and, thirteen years after *Mills*, without direction from this Court, there continues to be no consensus in the federal courts. *Sherman*, 987 F.2d at 408.

In 1981, this Court recognized the "broad significance" of the federal constitutional issues raised in *Mills*: Do involuntarily committed patients have a fundamental right to refuse psychotropic medication? If so, what competing State interests outweigh this fundamental right? *Mills*, 457 U.S. at 298. The present petition asks those same questions and more, because the impact of the present case is broader even than that of *Mills*. The Massachusetts statute at issue in *Mills* involved the rights only of involuntarily committed inpatients with mental illnesses. Illinois's Section 2-107.1, which is at issue here, involves the rights of involuntary patients as well as voluntary patients, inpatients as well as outpatients, and persons with mental illnesses as well as persons with developmental disabilities.

Moreover, Illinois's Section 2-107.1 is not a unique aberration in mental health law. At least twelve other states have statutes similar to Section 2-107.1[6]—and there is no way of knowing how many state hospitals have written policies or unwritten practices similar to the policy in *Woodland v. Angus*—all of which allow the involuntary administration of psychotropic medications to persons who

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[6] *See* Alaska Stat. Sec. 47.30.839 (Supp. 1994); Cal. Welf. & Inst. Code Sec. 5332(b) (Deering Supp. 1994); Colo. Rev. Stat. Sec. 27-10-111(4.5) (1989); Ky. Rev. Stat. Ann. Sec. 202A.196 (Michie 1991); Md. Health Gen. Code Ann. Sec. 10-708(b)(2) (1994); Minn. Stat. Ann. Sec. 253B.03(6c)(c) (1994); N.Y. Admin. Code Tit. 14, Sec. 527.8(c)(4) (1988); S.D.Codified Laws Ann. Sec. 27A-12-3.13, 3.15 (1992); Tex. Health & Safety Code Ann. Sec. 574.104 (Supp. 1994); Utah Code Ann. Sec. 62A-5-318 (1993); Va. Code Sec. 37.1-134.5 (1990 & Supp. 1994); Wis. Stat. Ann. Sec. 51.61(1)(g) (1987 & Supp. 1994).

may lack decisional capacity but who pose no threat of harm to themselves or to anyone else. Given the broad sweep of the Illinois statute, the number of similar statutes in other states, the continuing lack of consensus in the courts, and the invasiveness and potential dangerousness of psychotropic medication, the present case offers this Court the opportunity to provide needed guidance concerning an important federal issue.

II.

THE ILLINOIS SUPREME COURT'S OPINION CONFLICTS WITH *O'CONNOR*, *CRUZAN*, *HAWKS v. LAZARO*, AND *GUARDIANSHIP OF ROE*; WITHOUT A PRIOR DETERMINATION OF SUBSTITUTED JUDGMENT, THE STATE'S *PARENS PATRIAE* INTEREST CANNOT OUTWEIGH A PERSON'S RIGHT TO REFUSE PSYCHOTROPIC MEDICATION. THEREFORE, SECTION 2-107.1 VIOLATES THE DUE PROCESS CLAUSE.

The Illinois Supreme Court upheld Section 2-107.1 as a proper exercise of "the State's significant *parens patriae* interest in providing for persons who, while suffering from a serious mental illness or developmental disability, lack the capacity to make reasoned decisions concerning their need for medication." (Appendix A-15) This holding is erroneous and conflicts with opinions from this Court and lower courts which have placed limits on the State's authority to force mental health treatment onto unwilling recipients.

Recognizing limits on the State's authority to order involuntary civil commitment, for example, this Court has written:

> Persons who are mentally ill and incapable of giving informed consent to admission would not necessarily meet the [state's] statutory standard for involuntary placement . . . The involuntary placement process serves to guard against the confinement of a person who, though

> mentally ill, is harmless and can live safely outside an institution. Confinement of such a person . . . is unconstitutional. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (there is no constitutional basis for confining mentally ill persons involuntarily "if they are dangerous to no one and can live safely in freedom").

Zinermon v. Burch, 494 U.S. 113, 133-134 (1990). *See also Foucha v. Louisiana*, 112 S. Ct. 1780, 1784 (1992) (explaining *O'Connor*, 422 U.S. 563).

Similarly, the West Virginia Supreme Court struck down that state's statute which allowed the involuntary civil commitment of a person who "because of his [mental] illness or retardation lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization." *State ex rel. Hawks v. Lazaro*, 157 W. Va. 417, 202 S.E.2d 109 (1974). According to the court, the statute was invalid because the State's *parens patriae* interest does not justify involuntarily committing persons simply because they fail to understand that hospitalization may be in their best interests. *Hawks*, 157 W.Va. at 437, 202 S.E. 2d at 123. *Accord Kendall v. True*, 391 F. Supp. 413, 417 (W.D. Ky. 1975); *Doremus v. Farrell*, 407 F. Supp. 509, 514 (D. Neb. 1975); *Lynch v. Baxley*, 386 F. Supp. 378, 390 (M.D. Ala. 1974); *Bell v. Wayne County General Hospital at Eloise*, 384 F. Supp. 1085, 1095 (E.D. Mich. 1974).

These involuntary commitment cases are appropriate analogues to involuntary medication cases. *Rennie v. Klein*, 653 F.2d 836, 845 (3d Cir. 1980), *vacated*, 458 U.S. 1110 (1982), *reaffirmed on remand*, 720 F.2d 266 (3d Cir. 1983). Thus, the Massachusetts Supreme Court has held that, just as the State's *parens patriae* interest cannot justify civil commitment, the State's "*parens patriae* interest . . . does not outweigh the fundamental individual right[ ]" to refuse unwanted psychotropic medication. *In the Matter of Guardianship of Roe*, 383 Mass. 415, 449, 421 N.E.2d 40, 59

(1981). *Accord Rogers v. Commissioner of the Department of Mental Health*, 390 Mass. 489, 513, 458 N.E.2d 308, 323 (1983) ("in a non-emergency situation, no State interest is sufficiently compelling to overcome a patient's decision to refuse treatment with antipsychotic drugs"). *Cf. Washington v. Harper*, 494 U.S. 210, 227-228 (1990) (determination that prison inmate is dangerous is "precondition" to overriding his right to refuse antipsychotic drugs).

Like competent persons, persons who lack decisional capacity, but who pose no threat of danger, have the right to refuse unwanted psychotropic medication, and they retain the right to refuse even when the State asserts its *parens patriae* interest in providing for their best interests. Unlike competent persons, however, persons who lack decisional capacity cannot exercise their right to refuse for themselves. Instead, it must be exercised for them by a surrogate decision maker, and, to give their right its full measure, it must be exercised for them through the use of the substituted judgment standard.

In *Cruzan v. Director, Missouri Department of Health*, this Court approved use of the substituted judgment standard when determining whether to withdraw life-sustaining treatment from a comatose patient. There, this Court stressed the importance of determining "the wishes expressed by the patient while competent," the "deeply personal" nature of the right to refuse, and the necessity of considering only the patient's wishes, not those of her doctors, her family, or anyone else. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 280-281, 285-286 (1990). Thus, this Court concluded that "Due Process requires the state to repose judgment on these matters with . . . the patient herself." *Cruzan*, 497 U.S. at 286.

Relying on *Cruzan*, a federal district court struck down as unconstitutional a hospital policy governing the involuntary

administration of psychotropic medications. *Woodland v. Angus*, 820 F. Supp. 1497 (D. Utah 1993). In *Woodland*, the plaintiff was mentally ill, an inpatient in a state hospital, incompetent to stand trial, and incapable of making decisions concerning his medical treatment, but he was not dangerous. Pursuant to its policy, the hospital sought to medicate him, over his objections, in accord with his "medical interest and . . . prevailing standards of medical practice." *Woodland*, 820 F. Supp. at 1501. The district court, however, prohibited the state from forcibly administering psychotropic medication based simply on the patient's "medical interest." The State "cannot merely assert its *parens patriae* interest and ignore plaintiff's significant liberty interest in the unwanted administration of antipsychotic medication." *Woodland*, 820 F. Supp at 1517. "While, as with Nancy's parents in *Cruzan*, the court has no doubt that defendants are concerned with plaintiff's best interests, the court holds that this decision [regarding psychotropic medication] must repose with plaintiff himself." *Woodland*, 820 F. Supp. at 1516. Therefore, the court directed the state to follow its laws requiring the appointment of a guardian and the utilization of the substituted judgment standard. *Woodland*, 820 F. Supp at 1516-1517.

Likewise, the Massachusetts Supreme Court has held that antipsychotic medication may be forcibly administered to a person who lacks decisional capacity, but who poses no immediate threat of harm, only "where a judicial substituted judgment determination indicates that the incompetent individual would, if competent, accept antipsychotic drugs." *Roe*, 383 Mass. at 453, 421 N.E.2d at 61. *Accord Rogers*, 390 Mass. at 504, 458 N.E.2d at 318.

The Illinois Supreme Court's decision in the present case conflicts with *Cruzan*, *Woodland*, and *Roe*. Although apparently stating an appreciation for the substituted judgment

standard, the Illinois Supreme Court found merely that Section 2-107.1 "permits" consideration of substituted judgment and that a patient's wishes, when competent, "will often be very relevant" to a determination of whether psychotropic medications should be administered. (Appendix A-21) Thus, by obvious implication, the court found that evidence of substituted judgment may sometimes *not* be relevant and that, while consideration of substituted judgment is permitted, such consideration is not *required*.

The Illinois Supreme Court's discretionary phraseology contrasts sharply with the mandatory language of *Cruzan*: "Due Process requires the state to repose judgment on these matters with . . . the patient herself." *Cruzan*, 497 U.S. at 286. As this Court has held, a statute which permits mere discretionary compliance with constitutional mandates is not constitutional. *Wardius v. Oregon*, 412 U.S. 470 (1973). Therefore, as construed by the Illinois Supreme Court, Section 2-107.1 is not constitutional.

Without requiring substituted judgment, the Illinois Supreme Court upheld Section 2-107.1 as a valid exercise of the State's *parens patriae* power. That holding conflicts with *O'Connor*, *Hawks*, and *Roe* and with opinions from several federal district courts. Contrary to the Illinois Supreme Court's ruling in this case, the State has no *parens patriae* authority, without a prior determination of substituted judgment, to force unwanted mental health or developmental disability services onto persons who may lack decisional capacity but who pose no threat of harm to themselves or to anyone else.

III.

THE ILLINOIS SUPREME COURT'S OPINION IS ERRONEOUS; THE CREATION OF TWO DISPARATE JUDICIAL PROCEDURES TO MAKE TREATMENT DECISIONS FOR PERSONS WHO LACK DECISIONAL CAPACITY VIOLATES THE EQUAL PROTECTION CLAUSE.

Prior to the enactment of Section 2-107.1, a person who allegedly lacked capacity to make a reasoned decision concerning his/her medical care was named the respondent in a petition for the appointment of a guardian. If the court found that the respondent was a "disabled person" and in need of a guardian, the court would appoint either a limited or a plenary guardian to make medical decisions for the ward. *See generally* 755 ILCS 5/11a-1 *et seq.* (West 1992). These medical decisions could, of course, include decisions to give or withhold informed consent for psychotropic medication. *In the Matter of Orr*, 176 Ill. App. 3d 498, 531 N.E.2d 64 (4th Dist. 1988).

In 1989, a Commission selected by the Governor of Illinois reviewed the state's mental health laws and found "numerous shortcomings in the use of guardianship proceedings" to determine when psychotropic medication should be ordered over the objections of the patient. (Appendix A-4) To create an alternative method of ordering involuntary medication, the Illinois legislature enacted Section 2-107.1. As a result, Illinois now has two separate, and unequal, procedures for dealing with persons who may lack decisional capacity to refuse psychotropic medications. The first is to file a petition for the appointment of a guardian under the guardianship statute; the second is to file a petition for court ordered medication under Section 2-107.1. The mischief of this scheme is that respondents in 2-107.1 hearings are denied certain rights which are granted to similarly situated respondents in guardianship hearings.

For example, under the guardianship statute, the petition for guardianship must be accompanied by a physician's report which details the respondent's alleged mental disability and offers an opinion as to whether the respondent is capable of making decisions. 755 ILCS 5/11a-9 (West 1992). This report serves to establish probable cause to continue the proceedings and prevents the filing of spurious petitions. In contrast, Section 2-107.1 contains no similar requirement.

Under the guardianship statute, in order to avoid conflicts of interest, a person or agency providing direct residential services to the respondent can never be appointed guardian. 755 ILCS 5/11a-5(b) (1992). In contrast, Section 2-107.1 contains no similar prohibition. Instead, if the respondent is an inpatient at a mental health or developmental disability facility, the trial court may authorize the facility's employees to involuntarily medicate the respondent. The facility's employees, however, may have conflicting loyalties to the facility and to other patients in the facility. *See Rogers v. Commissioner of the Department of Mental Health*, 390 Mass. 489, 503, 458 N.E.2d 308, 317 (1983) (". . . doctors who are attempting to treat as well as to maintain order in the hospital have interests in conflict with those of their patients who may wish to avoid medication . . . the temptation to engage in blanket prescription of such drugs to maintain order and compensate for personnel shortages may be irresistible.").

Under the guardianship statute, the guardian has no power to act on any matter covered by a power of attorney previously executed by the respondent. 755 ILCS 5/11a-17(c) (West 1992). In contrast, Section 2-107.1 provides no guarantee that a previously executed power of attorney will be honored.

Lastly, under the guardianship statute, the respondent is provided with a surrogate decision maker who oversees the ward's treatment and who exercises the ward's statutory, common law, and constitutional rights through use of the substituted judgment standard. 755 ILCS 5/11a-17(a) (West 1992); *In re Estate of Greenspan*, 137 Ill. 2d 1, 17-18, 558 N.E.2d 1194 (1990) (approving use of substituted judgment). In contrast, Section 2-107.1 provides no overseer of the patient's treatment and, as construed by the Illinois Supreme Court, sometimes permits, but does not always require, use of the substituted judgment standard.

The Illinois Supreme Court held that Section 2-107.1 does not violate equal protection, but the court reached that conclusion without citing any authority and without conducting any legal analysis. The court did not determine whether a fundamental right or a suspect class was involved, did not specify the level of scrutiny employed, and did not state the factors it considered in performing whatever level of scrutiny was employed. Moreover, the court did not even mention most of the differences between the two statutes which are described above and certainly did not explain how these differences were related to any State interest.

Not only is the court's conclusion baseless, it is erroneous. The guarantee of equal protection is that similarly situated persons will be similarly treated under the law. The court found that the guardianship statute's definition of "disabled person" "bears substantial similarity" to 2-107.1's requirement that respondents lack capacity to make a reasoned decision. (Appendix A-30) Having correctly found that respondents under the two statutes are similarly situated, however, the court then erred by upholding the statute. Respondents under 2-107.1 are not given the same rights as are similarly situated respondents under the guardianship statute. As this Court has held, persons are deprived of

equal protection if they are deprived of certain rights merely because a complaining party arbitrarily decides to seek relief under one statute rather than another. *Humphrey v. Cady,* 405 U.S. 504 (1972).

One federal court has struck down a state's statutory scheme which, like Illinois's, gave mentally ill persons who did not have guardians fewer procedural protections than it gave similarly situated mentally ill persons who did have guardians. *Vecchione v. Wohlgemuth*, 377 F. Supp. 1361 (E.D. Pa. 1974), *enforced in* 558 F.2d 150 (3d Cir. 1977). At issue were Pennsylvania statutes which required hospitals to remit the assets of patients with guardians to the guardians and to hold hearings before the assets could be used to defray the cost of care. In contrast, the same statutes authorized hospitals to seize the assets of patients without guardians and to use the assets to defray the cost of care, without providing notice and without holding hearings. The court used the deferential rational basis test but, nonetheless, held that these Pennsylvania statutes violated equal protection. *Vecchione*, 377 F. Supp. at 1368-1369.

Section 2-107.1 violates equal protection, too. Created expressly as a means of avoiding the guardianship statute, it creates an alternative, inferior method of making treatment decisions for persons who, as a result of mental illnesses or developmental disabilities, may lack decisional capacity to refuse psychotropic medication. The Illinois Supreme Court erred in upholding the constitutional validity of Section 2-107.1.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

JOHN B. LOWER
General Counsel
WILLIAM E. COFFIN
Counsel of Record
JEFFREY M. PLESKO
Illinois Guardianship and
Advocacy Commission
160 North LaSalle Street
Suite S-500
Chicago, Illinois 60601
(312) 793-5908

Counsel for
Petitioner C.E.

MARK B. EPSTEIN
Epstein & Epstein
134 North LaSalle Street
Suite 2106
Chicago, Illinois 60602
(312) 782-3193

Counsel for
Petitioner L.E.

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No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

C.E. and L.E.,

Petitioners,

-v.

ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

JOHN B. LOWER
General Counsel
WILLIAM E. COFFIN
Counsel of Record
JEFFREY M. PLESKO
Illinois Guardianship and Advocacy Commission
160 North LaSalle Street
Suite S-500
Chicago, Illinois 60601
(312) 793-5908

Counsel for Petitioner C.E.

MARK B. EPSTEIN
Epstein & Epstein
134 North LaSalle Street
Suite 2106
Chicago, Illinois 60602
(312) 782-3193

Counsel for Petitioner L.E.

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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APPENDIX A

Docket No. 73605—Agenda 14—March 1993.

In re C.E., Asserted to be a Person in Need of Involuntary Psychotropic Medication (C.E. *et al.*, Appellees; The Department of Mental Health and Developmental Disabilities, Appellant).

JUSTICE McMORROW delivered the opinion of the court:

Section 2-107.1 of the Mental Health and Developmental Disabilities Code (hereinafter the Mental Health Code) (405 ILCS 5/2-107.1 (West 1992)) permits the trial court to authorize the involuntary administration of psychotropic medication to a person receiving mental health treatment when the court finds by clear and convincing proof, following a full hearing, that the recipient of mental health services is incapable of making the drug-treatment decision on his own behalf and is suffering from one or more of the conditions specified in the statute. (See 405 ILCS 5/2-107.1(d) (West 1992).) Although petitioned to authorize the involuntary administration of psychotropic substances under section 2-107.1, the trial court in the instant cause refused to do so, reasoning that section 2-107.1 was void as unconstitutional on its face. The Attorney General, on behalf of the Department of Mental Health and Developmental Disabilities, appeals from this ruling. (134 Ill. 2d R. 302(a).) We conclude that section 2-107.1 is not facially invalid on the constitutional grounds advanced in this appeal. Accordingly, we reverse and remand.

I

The recipient of mental health services in this case is C.E., an adult male whom the circuit court found subject to involuntary admission to a hospital for treatment

and evaluation in August 1991. At this initial commitment hearing, the court determined the evidence showed, by clear and convincing proof, that appointment of a temporary guardian was necessary for C.E.'s welfare and protection because of his psychotic condition. The court specifically found that C.E.'s refusal to accept and take prescribed medical and psychiatric tests and treatments was a product of his psychotic state.

On the basis of these findings, the court appointed C.E.'s father, L.E., as C.E.'s temporary guardian. The court granted L.E. the power to give informed consent to the administration of generally accepted medical and psychiatric treatment, including but not limited to psychotropic medication. The trial court determined that the provisions of section 2-107.1 did not apply to the proceedings before it, because the statute was not in effect when L.E.'s petition was initially filed. However, the trial court's order further provided that L.E., as guardian for C.E., could not authorize psychotropic medication until all of the following conditions were met:

> "(a) the treating physician has first conducted the appropriate screening tests for such medication; (b) the treating physician has confirmed that [C.E.] has been medically cleared for the administration of psychotropic medication; and (c) the attorney for [C.E.] and the Guardian Ad Litem have determined to their satisfaction that [C.E.] has been properly medically cleared for the administration of psychotropic medication."

When L.E.'s temporary guardianship powers under the trial court's order were about to expire, L.E. filed a petition to renew his broad guardianship powers under the original order issued by the probate court which allowed forced administration of psychotropic medication. Because L.E. believed that his broad guardianship powers would

be improperly restricted under section 2-107.1 of the Mental Health Code (405 ILCS 5/2-107.1 (West 1992)), L.E. filed a petition that the court declare section 2-107.1 unconstitutional.

Thereafter, the trial court appointed the Guardianship and Advocacy Commission as attorney for C.E. The Attorney General appeared on behalf of the Department of Mental Health and Developmental Disabilities, in order to defend the constitutionality of the statute, and filed a motion to dismiss the father's petition to declare section 2-107.1 unconstitutional. The Attorney General also filed a motion to dismiss L.E.'s petition on the ground that L.E. lacked standing to challenge the constitutionality of the statute. Later, counsel for C.E. filed a petition for declaratory relief and requested that the trial court declare section 2-107.1 unconstitutional.

Following briefing and argument, the trial court determined that L.E. had standing to challenge the constitutionality of section 2-107.1. In a lengthy memorandum opinion, the court found section 2-107.1 facially unconstitutional and held the section null and void. The Attorney General, on behalf of the Department of Mental Health and Development Disabilities, filed a direct appeal from the trial court's order. 134 Ill. 2d R. 302(a).

II

Generally, under the Mental Health Code (405 ILCS 5/2-100 *et seq.* (West 1992)), an adult recipient of mental health services or the recipient's guardian has the authority and the right to refuse recommended mental health services including medication. (405 ILCS 5/2-107 (West 1992).) If the recommended services are refused, the recipient or guardian must be informed of alternative ser-

vices also available, as well as the risks of such alternatives, and must additionally be advised of the possible consequences of refusing the services. 405 ILCS 5/2-107 (West 1992).

The Mental Health Code further provides that the recommended mental health services may be administered against the wishes of the recipient or guardian when "such services are necessary to prevent the recipient from causing serious harm to himself or others." (405 ILCS 5/2-107 (West 1992).) In *In re Orr* (1988), 176 Ill. App. 3d 498, the court held that this provision allows the involuntary administration of psychotropic medication either where the mental health recipient is incapable of making the decision in his own behalf, or where the recipient poses an immediate threat of serious physical harm to himself or others. *Orr*, 176 Ill. App. 3d at 510.

In light of the court's decision in *Orr*, the circuit courts in some counties, such as the circuit court of Cook County in the instant appeal, undertook to describe those circumstances under which a guardian could consent to the administration of psychotropic medication when the ward was incapable of making this treatment decision in his own behalf. A Commission appointed by the Governor in 1989 to revise the Mental Health Code found serious flaws in the failure to provide adequate guidelines for the involuntary administration of psychotropic substances. The Commission also found numerous shortcomings in the use of guardianship proceedings to determine whether involuntary administration of psychotropic medication should be ordered. (See Report of the Governor's Commission to Revise the Mental Health Code of Illinois 44-47 (1989).) The Commission recommended that the Mental Health Code be amended to specifically provide for the involuntary administration of psychotropic medication in nonemergency settings.

Section 2-107.1, which was adopted and took effect on August 13, 1991 (see Pub. Act 87-124, §1), delineates the nonemergency circumstances under which psychotropic medication may be administered against the wishes of the recipient. Under section 2-107.1, psychotropic medication may be administered to one who is receiving mental health services, even though the recipient may not consent to such treatment, provided the standards and procedures set out in the section are satisfied. 405 ILCS 5/2-107.1 (West 1992).

In order to authorize such a procedure under section 2-107.1, a petition must be filed in the circuit court requesting a court order to administer the medication. This petition may be filed by any person at least 18 years of age. (405 ILCS 5/2-107.1(a) (West 1992).) In addition, section 2-107.1 directs that forced administration of psychotropic medication is only authorized if the court finds evidence of each of the following elements, by clear and convincing proof:

> "(1) That the recipient has a serious mental illness or developmental disability.
>
> (2) That because of said mental illness or developmental disability, the recipient exhibits deterioration of his ability to function, suffering, or threatening or disruptive behavior.
>
> (3) That the illness or disability has existed for a period marked by the continuing presence of the symptoms set forth in paragraph (2) [above] or the repeated episodic occurrence of these symptoms.
>
> (4) That the benefits of the psychotropic medication will outweigh the harm.
>
> (5) That the recipient lacks the capacity to make a reasoned decision about the medication.
>
> (6) That other less restrictive services have been explored and found inappropriate." 405 ILCS 5/2-107.1(d) (West 1992).

Once the petition for authorization of forced administration of the medication is filed, the circuit court is directed to hold a hearing within 30 days. (405 ILCS 5/2-107.1(b) (West 1992).) Section 2-107.1 limits orders authorizing involuntary administration of medication to duration of 90-day intervals, although additional 90-day periods may be authorized "without limitation" provided additional hearings are held in compliance with the provisions of the statute. (405 ILCS 5/2-107.1(e) (West 1992).) The court's order must designate the individuals who are authorized to administer the medication. (405 ILCS 5/2-107.1(f) (West 1992).) In addition, a guardian is authorized to consent to the administration of psychotropic medication only in accordance with the standards and procedures of the section. 405 ILCS 5/2-107.1(g) (West 1992).

III

We first address the parties' arguments with respect to whether L.E., the father of the respondent C.E., has standing to challenge the constitutionality of section 2-107.1.

Generally, in order to have standing to pursue a declaratory judgment action, a party must be "interested" in the matter in controversy. (See 735 ILCS 5/2-701 (West 1992) (standing to pursue declaratory judgment action).) To be "interested," one "must possess a personal claim, status, or right which is capable of being affected. [Citations.]" *Underground Contractors Association v. City of Chicago* (1977), 66 Ill. 2d 371, 376; see also *Greer v. Illinois Housing Development Authority* (1988), 122 Ill. 2d 462, 492-93.

This court considered a similar question in *In re Estate of Longeway* (1989), 133 Ill. 2d 33. In that case, a guardian filed a petition for a declaratory judgment to deter-

mine whether the guardian had the power to authorize the withdrawal of artificial hydration and nutrition on behalf of the ward. This court held that the guardian had the standing to file such a request for declaratory judgment relief. This court found it significant that the guardian's suit was not instituted on behalf of the ward, but "merely petition[ed] the court for authority to perform an act which [was allegedly] within the implied authority granted [to the guardian] by the Probate Act." *Longeway*, 133 Ill. 2d at 46 (distinguishing *In re Marriage of Drews* (1986), 115 Ill. 2d 201); see also *In re Estate of Greenspan* (1990), 137 Ill. 2d 1, 13.

We find the reasoning in *Longeway* equally applicable to the present cause and conclude that respondent's father, L.E., possesses sufficient interest in the matter in controversy to challenge the constitutionality of section 2-107.1 of the Mental Health Code. The record indicates that L.E. was still C.E.'s guardian at the time he filed the motion to declare section 2-107.1 unconstitutional. L.E.'s motion sought to continue his power as C.E.'s guardian to consent to the administration of psychotropic medication to C.E. without the need to resort to further judicial review, based upon the broad guardianship powers to make decisions regarding a ward's "support, care, comfort, health, education and maintenance" under the Probate Act of 1975 (755 ILCS 5/11a-17 (West 1992)). On this basis, L.E.'s motion sought a declaration that section 2-107.1 of the Mental Health Code is unconstitutional. Because L.E. was seeking guidance from the court regarding L.E.'s guardianship powers under the Probate Act and the Mental Health Code, L.E. had standing to challenge the constitutionality of section 2-107.1.

IV

Respondent, C.E., and his father, L.E., seek to justify the trial court's holding that section 2-107.1 is null and void because it is unconstitutional on its face. However, such an argument must overcome considerable hurdles:

> "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances in insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment. [Citation.]" *United States v. Salerno* (1987), 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707, 107 S. Ct. 2095, 2100.

Bearing in mind these principles, we review the parties' arguments in this appeal.

A. Constitutional Right to Refuse Psychotropic Medication

The main thrust of C.E.'s challenge to the constitutionality of section 2-107.1 is his claim that he has a fundamental interest in refusing medical treatment. According to C.E., section 2-107.1 is facially unconstitutional because it impermissibly infringes upon his fundamental constitutional right, under the United States and Illinois Constitutions, to refuse the administration of psychotropic medication. The questions of whether there is a constitutional right to refuse psychotropic medication, and the circumstances under which the government may exercise a legitimate basis to override the patient's wishes, have spawned considerable commentary. See Refusing Treatment in Mental Health Institutions—Values in Conflict (A. Doudera

& J. Swazey 1982) (hereinafter Refusing Treatment); Cichon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs, 53 La. L. Rev. 283 (1992) (hereinafter* "Just Say No"); Brakel & Davis, *Taking Harms Seriously: Involuntary Mental Patients and the Right to Refuse Treatment*, 25 Ind. L. Rev. 429 (1991); Cichon, *The Potential Impact of Harper v. Washington on South Dakota's Statutory Right to Refuse Psychiatric Treatment*, 36 S.D. L. Rev. 478 (1991); Winick, *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. Miami L. Rev. 1 (1989); Cichon, *The Eighth Circuit and Professional Judgment: Retrenchment of the Constitutional Right to Refuse Antipsychotic Medication*, 22 Creighton L. Rev. 889 (1989); Beck, *Right to Refuse Antipsychotic Medication: Psychiatric Assessment and Legal Decision-making*, 11 Mental & Physical Disability Law Reporter 368 (1987); Gelman, *Mental Hospital Drugs, Professionalism, and the Constitution*, 72 Georgetown L.J. 1725 (1984); Gutheil & Appelbaum, *"Mind Control," "Synthetic Sanity," "Artificial Competence," and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 Hofstra L. Rev. 77 (1983); Gaughan & LaRue, *The Right of a Mental Patient to Refuse Antipsychotic Drugs in an Institution*, 4 L. & Psychol. Rev. 43 (1978); Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 Nw. U.L. Rev. 461 (1977); Comment, *Pathway Through the Psychtropic Jungle: The Right to Refuse Psychotropic Drugs in Illinois*, 18 J. Marshall L. Rev. 407 (1985).

C.E. initially argues that he has a fundamental constitutional privacy right that encompasses the right to refuse medical treatment. We have previously declined to consider this issue, and also choose not to address the question in this appeal. In *Longeway*, this court acknowledged

that it "[l]ack[ed] guidance from the [United States] Supreme Court" regarding "whether Federal privacy guarantees the right to refuse *** medical treatment." (*Longeway*, 133 Ill. 2d at 44.) In addition, "[l]acking a clear expression of intent from the drafters of our 1970 State constitution, we similarly abstain[ed] from expanding the privacy provision of our State constitution to embrace this right. [Citation.]" (*Longeway*, 133 Ill. 2d at 44.) We find these observations equally applicable to the present cause, and decline C.E.'s invitation to determine whether there is a Federal or State constitutional right to privacy that encompasses a right to refuse medical treatment.

However, we believe that C.E. possesses a Federal constitutional right to refuse the administration of psychotropic medication under the "liberty" interest recognized in constitutional jurisprudence. According to United States Supreme Court precedent, there can be "no doubt" (*Washington v. Harper* (1990), 494 U.S. 210, 221, 108 L. Ed 2d 178, 198, 110 S. Ct. 1028, 1036) but that a mentally ill person such as C.E. has a liberty interest, under the due process clause of the fourteenth amendment to the United States Constitution, to refuse to be medicated with psychotropic substances. In *Washington v. Harper* (1990), 494 U.S. 210, 108 L. Ed. 2d 178, 110 S. Ct. 1028, the Court held that a State prisoner has a liberty interest, under the due process clause of the fourteenth amendment to the United States Constitution, in refusing the administration of psychotropic medication. And in *Cruzan v. Director, Missouri Department of Health* (1990), 497 U.S. 261, 279, 111 L. Ed 2d 224, 242, 110 S. Ct. 2841, 2851-52, the Court acknowledged that all persons have a protected liberty interest under the fourteenth amendment to the Constitution to refuse certain medical treatments. (See also *Vitek v. Jones* (1980), 445 U.S. 480, 63 L. Ed. 2d 552,

100 S. Ct. 1254 (State prisoner has protected liberty interest in proper procedures for transfer to mental hospital); *Youngberg v. Romeo* (1982), 457 U.S. 307, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (person involuntarily admitted to State mental institution has protected liberty interest in safe conditions of confinement, freedom from unnecessary bodily restraints, and right to minimally adequate degree of training); *Mills v. Rogers* (1982), 457 U.S. 291, 73 L. Ed. 2d 16, 102 S. Ct. 2442 (noting, but not deciding, question of whether involuntarily admitted mental patients have constitutional right to refuse treatment with psychotropic drugs).) In light of this precedent, it appears that persons who are mentally ill or developmentally disabled have a Federal constitutionally protected liberty interest to refuse the administration of psychotropic drugs.

Two fundamental concerns have guided our conclusion that the prerogative to refuse unwanted psychotropic medication is a protected right of the mental health recipient. The first of these concerns arises from the substantially invasive nature of psychotropic substances and their significant side effects. (See generally Blackwell, *Schizophrenia and Neuroleptic Drugs: A Biopsychosocial Perspective*, in *Refusing Treatment*, at 3-18.) Psychotropic drugs have been described as "mood altering." (*Davis v. Hubbard* (N.D. Ohio 1980), 506 F. Supp. 915, 927.) Their beneficial effects occur by their power to cause the brain to "integrate perceptions and memory," thereby "stabiliz[ing] and blunt[ing] thought processes." (*Davis v. Hubbard*, 506 F. Supp. at 927.) However, the potential side effects of psychotropic drugs are numerous—drowsiness, fatigue, dry mouth and throat, blurred vision, impaired eyesight and blindness, weight gain, skin disorders, blood disorders, jaundice, liver dysfunction, and cardiovascular problems. (See, *e.g.*, Cichon, "*Just Say No*," 53 La. L. Rev. at 297-300.) The medication may also cause patients to suffer side

effects similar to Parkinson's disease (rigid, mask-like face, tremors, drooling), or may cause a condition known as akathisia, where a person may be unable to sit still or may suffer an irresistible desire to walk continuously. (Chichon, "*Just Say No*," 53 La. L. Rev. at 300-03.) More serious is a permanent side effect known as tardive dyskinesia, where the person suffers from involuntary muscle movements; its advance stage interferes with motor activity, causing difficulty in speech, breathing, or swallowing. (Cichon, "*Just Say No*," 53 La. L. Rev. at 303-07.) The condition may not appear until late in the course of treatment and is thought to be permanent and "fairly widespread." (*Davis v. Hubbard*, 506 F. Supp. at 929.) Still another side effect is neuroleptic malignant syndrome (NMS), whose "cardinal features *** are hyperthermia (fever), severe skeletal rigidity, elevated blood pressure, tachycardia, and alterations in consciousness including delirium, mutism, stupor, and coma." (Cichon, "*Just Say No*," 53 La. L. Rev. at 307-08.) According to one commentator,

> "NMS can last from several days to several weeks, even after antipsychotic medication is discontinued. This disorder is fatal in twenty to thirty percent of the cases with the risk of death being even higher when depot (sustained action intermuscular) forms of antipsychotics are used. Death usually occurs within three to thirty days after the onset of symptoms and is frequently caused by respiratory failure, cardiovascular collapse and acute kidney failure. NMS can also cause permanent neurological damage, indicated by dementia and signs of parkinsonism." Cichon, "*Just Say No*," 53 La. L. Rev. at 308.

Our second concern is the recognition that psychotropic substances may be misused by medical personnel, and subverted to the objectives of patient control rather than patient treatment. C.E. reminds this court that it has

already been observed that in the past, other governments have used involuntary psychiatric treatment as a "ruse" and a "device to silence critics" (*People v. Valentine* (1990), 201 Ill. App. 3d 10, 13) and that the mental health laws may be manipulated into a "tool to oppress" (*In re Long* (1990), 203 Ill. App. 3d 357, 364). Reported decisions have detailed instances where mental health personnel administered psychotropic substances, not for the patient's therapy, but for the purposes of managing and disciplining the patient. (See, *e.g.*, Brotman, *Behind the Bench on Rennie v. Klein*, in Refusing Treatment, at 31-41.) As one commentator has noted, "The over-crowded and understaffed conditions at most public institutions invited use of [psychotropic] drugs for purposes other than treatment, including restraint, punishment, and convenience." Cichron, "*Just Say No*," 53 La. L. Rev. at 285.

A number of decisions from other jurisdictions have also considered whether and under what circumstances psychotropic drugs can be administered. In many of these cases, the court has recognized a mentally ill person's substantial liberty interest, under the due process clause of the fourteenth amendment to the United States Constitution, to refuse to be medicated by such drugs. (*United States v. Charters* (4th Cir. 1988), 863 F.2d 302; *Dautremont v. Broadlawns Hospital* (8th Cir. 1987), 827 F.2d 291; *Johnson v. Silvers* (4th Cir. 1984), 742 F.2d 823; *Bee v. Greaves* (10th Cir. 1984), 744 F.2d 1387; *Project Release v. Prevost* (2d Cir. 1983), 722 F.2d 960; *Rennie V. Klein* (3d Cir. 1983), 720 F.2d 266; *Woodland v. Angus* (D. Utah 1993), 820 F. Supp. 1497; *R.A.J. v. Miller* (N.D. Tex. 1984), 590 F. Supp. 1319; *United States v. Leatherman* (D.D.C. 1983), 580 F. Supp. 977; *Davis v. Hubbard* (N.D. Ohio 1980), 506 F. Supp. 915.) A few have also relied upon a constitutional right of privacy under the fourteenth amendment.

(*Rogers v. Okin* (1st Cir. 1980), 634 F.2d 650, *remanded* (1982), 457 U.S. 291, 73 L. Ed. 2d 16, 102 S. Ct. 2442; *Rennie v. Klein* (3d Cir. 1983), 720 F.2d 266; *In re Mental Commitment of M.P.* (Ind. 1987), 510 N.E.2d 645; *In re Mental Health of K.K.B.* (Okla. 1980), 609 P.2d 747.) Several others have been persuaded by State constitutions or common law (*Large v. Superior Court* (1986), 148 Ariz. 229, 714 P.2d 399; *People v. Medina* (Colo. 1985), 705 P.2d 961 (*en banc*); *Rogers v. Commissioner of Department of Mental Health* (1983), 390 Mass. 489, 458 N.E.2d 308; *In re Guardianship of Roe* (1981), 383 Mass. 415, 421 N.E.2d 40; *Jarvis v. Levine* (Minn. 1988), 418 N.W.2d 139; *Opinion of the Justices* (1983), 123 N.H. 554, 465 A.2d 484; *Rivers v. Katz* (1986), 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74; see generally Annot., *Nonconsensual Treatment of Involuntarily Committed Mentally Ill Persons with Neuroleptic or Antipsychotic Drugs as Violative of State Constitutional Guaranty*, 74 A.L.R.4th 1099 (1989).

However, these reported decisions have also recognized that the state has a legitimate *parens patriae* interest in furthering the treatment of those who are mentally ill by forcibly administering psychotropic medication when the patient is not capable of making a sound decision in his own behalf. (See, *e.g.*, *Opinion of the Justices* (1983), 123 N.H. 554, 465 A.2d 484; *Rivers v. Katz* (1986), 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74.) As one court aptly observed:

> "[There are] many situations [where], despite the risks of harmful side effects, the administration of drugs to an individual is clearly in his best interests because of the beneficial effects that the drugs can have, including the amelioration of the patient's illness. In such situations, the failure to medicate an incompetent patient could have side effects—*e.g.*, the unnecessary and possibly irreversible continuation of

> his illness—far more harmful, and probable, than any that might result from the drugs themselves.
>
> Thus, any treatment decision, including the decision not to treat, brings with it the potential for serious harm to the patient." *Rogers v. Okin* (1st Cir. 1980), 634 F.2d 650, 660.

We believe that section 2-107.1 embodies this State's significant *parens patriae* interest in providing for persons who, while suffering from a serious mental illness or development disability, lack the capacity to make reasoned decisions concerning their need for medication. "In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society.' [Citation]." (*Youngberg v. Romeo* (1982), 457 U.S. 307, 320, 73 L.Ed. 2d 28, 41, 102 S. Ct. 2452, 2460.) "It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriae*, to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy, defective understanding, or other misfortune or infirmity, are unable to take care of themselves." *County of McLean v. Humphreys* (1882), 104 Ill. 378, 383; see also *Longeway*, 133 Ill. 2d at 52.

In our opinion, section 2-107.1 bears an important and substantial relationship to the State's interest as *parens patriae* in providing for mentally ill or developmentally disabled persons who lack the capacity to make informed decisions concerning psychotropic medications. It is especially significant that the provisions of section 2-107.1 are narrowly tailored to specifically address the State's concern for the well-being of those who are not able to make a rational choice regarding the administration of psychotropic medications. Section 2-107.1 provides strict

standards that must be satisfied by clear and convincing evidence before medication can be ordered. The statute addresses the precise clinical disabilities involved—mental illness or developmental disability resulting in the incapacity to make reasoned decisions concerning psychotropic medications—and it provides a mechanism to determine, with specific reference to those disabilities, when such medications may be administered over the objections of a patient.

It is also significant that section 2-107.1 limits the involuntary administration of psychotropic medication to circumstances where the recipient, while incapacitated, is suffering from one of the specific conditions stated in the statute, *viz.*, a "deterioration of his ability to function, suffering, or threatening or disruptive behavior" (405 ILCS 5/2-107.1(d)(2) (West 1992)), and where these conditions have "existed for a period marked by the continuing presence of the symptoms *** or the repeated episodic occurrence of these symptoms" (405 ILCS 5/2-107.1(d)(3) (West 1992)). Furthermore, it must be demonstrated that the benefits of the psychotropic substances will outweigh the harm that may result from medication, and that other, less restrictive services have been considered and found ineffective. 405 ILCS 5/2-107.1(d)(4), (d)(6) (West 1992).

In addition, the statute requires a hearing before a trial court judge as a precondition to the involuntary administration of the medication. (405 ILCS 5/2-107.1(a) (West 1992).) This safeguard ensures that the medication will be used for therapeutic purposes and will not be misapplied as a means to discipline or "manage" the recipient. The statute also, and very importantly, limits psychotropic medication to 90-day periods of time. (405 ILCS 5/2-107.1(e) (West 1992).) Thus, section 2-107.1 not only ensures that only those persons who actually lack the capacity to make

reasoned decisions concerning psychotropic medication will have that decision made for them by the court as surrogate, it also ensures that persons who actually lack the capacity to make reasoned decisions concerning psychotropic medication will only be given such medication for the period of time it is most needed. Following 90 days on medication, a respondent may well have his faculties restored and no longer require treatment.

In light of all of these considerations, we conclude that section 2-107.1 does not, on its face, impermissibly burden the Federal constitutional liberty interests of C.E.

C.E. contends that section 2-107.1 is unconstitutional because it does not specifically require application of the "substituted judgment" test. C.E. reminds this court that the "substituted judgment" analysis was adopted in *Longeway* and *Greenspan*, in which this court found that a guardian may, in certain specifically limited circumstances, lawfully exercise a ward's common law right to refuse the administration of life-sustaining medical treatment. Under the substituted judgment analysis, the "surrogate decision-maker attempts to establish, with as much accuracy as possible, what decision the patient would make if he were competent to do so." (*Longeway*, 133 Ill. 2d at 49.) Under the "best interests" test, the court is guided by an objective standard of what a reasonable person would prefer under the circumstances of the particular case. See *Longeway*, 133 Ill. 2d at 48-49.

Initially, we note that section 2-107.1 does not explicitly adopt the "best interests" or the "substituted judgment" test. Neither phrase appears explicitly or verbatim in the language of section 2-107.1 We also find it noteworthy that section 2-107.1, by its terms, does not foreclose the court's consideration of the wishes expressed by the mental health recipient while the recipient was competent. Section 2-107.1

requires proof that the benefits of the psychotropic medication will outweigh its harms, and that other treatment alternatives have been considered and found ineffective. (405 ILCS 5/2-107.1(d)(4), (d)(5) (West 1992).) The wishes of the mental health recipient will often be highly pertinent to proof of these two factors. According to jurisprudential commentary, administration of psychotropic substances may be ineffective if the recipient does not agree to and accept the drugs:

> "The interaction of [numerous] *** variables, particularly the patient's subjective reaction to the medication, determine whether or not the pharmacologic effect of the drug will cause improvement in the patient's mental condition. *** Drugs produce an internal alteration which the patient has to accommodate and comprehend. If the patient perceives the drug therapy as a helping tool in controlling impulses that threaten to overwhelm him, the patient will integrate the pharmacologic change caused by the drug into his egostructure, thereby improving his mental condition. On the other hand, if the patient perceives the drug as destructive and malignant, the pharmacologic effect will cause a reaction which is antitherapeutic, worsening the patient's mental state ***." (Cole, *Patient's Rights vs. Doctors' Rights: Which Should Take Precedence*, in Refusing Treatment, at 58.)

Section 2-107.1 requires a showing, by clear and convincing proof, that the involuntary administration of the medication will outweigh the harms that may be caused by the medication. (405 ILCS 5/2-107.1(d)(4) (West 1992).) The recipient's subjective perceptions may well be an integral part of this proof. Thus, the factors specified in the statute may often require that the trial court take into account the subjective attitudes of the recipient while the recipient was competent.

Consequently, we conclude that section 2-107.1 permits the court's consideration of the "substituted judgment" of the mental health recipient, and that the court respect the wishes expressed by the mental health patient when the patient was capable of making rational treatment decisions in his own behalf. When those wishes have not been clearly proven, however, the court should be guided by an objective standard of reasonableness, as shown by the evidence presented. In this fashion, the court may preserve the integrity of the mental health patient while respecting the health care professional's duty to treat the patient. As one commentator has observed:

> "The traditional approach [in the involuntary administration of psychotropic medication] requires the decisionmaker to evaluate both medical and other evidence and reach an independent decision on what is in the 'best interests' of the incompetent patient. The operative guideline is 'what a reasonable person would do if competent.' The more modern 'substituted judgement' standard requires the proxy to inquire into the values and preferences of the patient and attempt to make a decision as the patient would, were he competent.
>
> The 'best interests' approach has been criticized as depriving incompetent individuals of rights which are accorded others 'by ignoring their uniqueness and imposing upon them the views of a hypothetical majority or 'reasonable man.' Community consensus replaces what are otherwise uniquely personal decisions.***
>
> The substituted judgment standard was developed in an attempt to afford respect to the personal values of the incompetent patient. However, in the many cases where clear evidence is lacking on how the incompetent patient would decide if competent, strict adherence to this doctrine converts it into a legal fiction. In these cases, the standard often camouflages

the fact that the proxy is, in reality, making an independent decision for the incompetent individual.

The hybrid approach *** for guiding proxy decision-making appears to strike an appropriate balance between respect for an incompetent patient's individualism and concern for his health and protection. The court should look to the patient's previously expressed preferences, values, and beliefs in an effort to exercise a substituted judgment. However, if clear and convincing evidence on this matter is lacking, as it often is, the decision should be based on the patient's best interests." Cichon, "*Just Say No*," 53 La. L. Rev. at 391-92.

See also *Charters I*, 829 F.2d at 498.

This interpretation of section 2-107.1, to permit a court's consideration of the patient's clearly expressed wishes while competent, is consistent with precedent of this court. For example, in *Greenspan*, this court discussed the public guardian's duty to act in the best interests of a ward who is incompetent, terminally ill, and whose death is imminent. The remarks of the court in *Greenspan* are equally applicable to the present cause:

"Though a guardian's duty is to act in a ward's best interest, such a standard is necessarily general and must be adapted to particular circumstances. One such circumstance is a ward's wish to exercise common law, statutory, or constitutional rights, which may sometimes influence or even override a guardian's own perception of best interests. [Citations.] This tension between a ward's legal rights of volition and a guardian's own judgment of the ward's best interests resembles the tension this court discerned in *Longeway* [citation] between the best-interests and substituted-judgment theories for deciding whether to discontinue an incompetent and terminally ill patient's artificial life support.

> In *Longeway*, this court approved application of the substituted-judgment theory, which requires a surrogate decisionmaker to establish, as accurately as possible, what the patient would decide if competent. [Citation.] Ascertainment of what the patient would decide must be based on clear and convincing evidence of the patient's intent, derived either from a patient's explicit expressions of intent or from knowledge of the patient's personal value system. [Citation.]
>
> If it is clearly and convincingly shown that [the ward's] wishes would be to withdraw artificial nutrition and hydration, and if the other established criteria for permitting such withdrawal are met, [the ward's] imputed choice cannot be governed by a determination of best interests by the public guardian *** or anyone else. Otherwise, the substituted-judgment procedure would be vitiated by a best-interests guardianship standard, elevating other parties' assessment of the meaning and value of life—or, at least, their assessments of what a reasonable individual would choose—over the affected individual's own common law right to refuse medical treatment. Accordingly, the public guardian is not prevented by a best-interests standard from seeking relief in accordance with [the ward's] wishes as determined by substituted-judgment procedure. [Citation.]" (*Greenspan*, 137 Ill. 2d at 17-18.)

Consistent with this reasoning in *Greenspan*, we conclude that a mental health recipient's wishes, when competent, will often by very relevant to a determination of whether psychotropic substances should be administered under section 2-107.1. In those instances where there is no proof of the mental health recipient's views when the recipient was competent, the court should be guided by the best interests of the patient. Accordingly, we find no error, under Federal constitutional law, in the legislature's fail-

ure to expressly include the "substituted judgment" test in section 2-107.1.

L.E. argues that section 2-107.1 is unconstitutional because it does not permit a guardian the right to exercise the ward's wishes, unless there has been court approval of the guardian's decision. L.E. claims that the requirement of court intervention, under section 2-107.1, is an undue and improper infringement on the ward's right to choose the course of his own medical treatment. We disagree. "We do not view the court's role under this statutory scheme as an unwarranted intrusion into the area of therapeutic medical decisions made for psychiatric treatment. Instead, the court merely oversees the guardian's decision making to ensure that the guardian complies with the statutory protection of section 2-107.1 of the Code." *In re Guardianship of Austin* (1993), 245 Ill. App. 3d 1042, 1050.

L.E. also contends that section 2-107.1 violates the first amendment rights of persons to choose and follow their individual religious beliefs. We find no such infirmity in the statutory provision. Section 2-102(b) of the Mental Health Code authorizes the withholding of generally accepted medical treatment where necessary to respect the recipient's religious beliefs. (See 405 IlCS 5/2-102(b) (West 1992).) There is nothing to indicate that this provision of the Mental Health Code would not be applicable to a person who, although falling within the purview of section 2-107.1, nevertheless chose to refuse psychotropic medication for religious reasons. Consequently, we find L.E.'s argument on this point unpersuasive.

B. Procedural Due Process

C.E. contends that section 2-107.1 violates procedural due process because it does not require that patients be

served with notice of the proceedings against them. Section 2-107.1 specifies that "[u]nless otherwise provided [in that section], the procedures set forth in Article VIII of Chapter 3 of [the Mental Health Code] [405 ILCS 5/3-800 *et seq.* (West 1992)], including the provisions regarding appointment of counsel, shall govern hearings held under" section 2-107.1. (405 ILCS 5/2-107.1(c) (West 1992).) Article VIII, chapter 3, of the Mental Health Code pertains to matters such as venue and the recipient's right to a jury trial in the context of an involuntary civil commitment proceeding. See *In re Brazelton* (1993), 245 Ill. App. 3d 1028, 1034.

Section 3-806 of the Mental Health Code is one of the article VIII, chapter 3, provisions applicable to proceedings under section 2-107.1. Section 3-806 states that the "respondent shall be present at any hearing held under this Act unless his attorney waives his right to be present and the court is satisfied by a clear showing that the respondent's attendance would subject him to substantial risk of serious physical or emotional harm." 405 ILCS 5/3-806 (West 1992).

Applying the requirements of section 3-806 to section 2-107.1 proceedings, actual attendance of the mental health recipient and his counsel is required at the trial court's hearing to decide whether a mental health recipient should be subjected to involuntary administration of psychotropic medication. If the mental health recipient and his attorney must attend the court's hearing, it would follow that the court must first notify the recipient and his attorney of the date, time and place of the hearing in order to ensure their attendance. Thus, section 2-107.1 implicitly requires the court to notify the mental health recipient and his counsel of the date, time and place of the court's hearing on the petition to order the involuntary administration

of psychotropic medication. This prior-notice requirement is consistent with the notice requirements of the Mental Health Code regarding involuntary civil commitments. (See 405 ILCS 5/3-706 (West 1992) (once court sets date of hearing, court "shall direct that notice of the time and place of hearing be served upon the respondent, his attorney, and guardian, if any, his responsible relatives, and the facility director of the facility").) In light of these considerations, we conclude that the trial court must ensure that notice of the date, time and place of the section 2-107.1 hearing is served upon the mental health recipient, his attorney, his guardian (if any), and any other interested parties to the proceeding.

In view of section 2-107.1's inclusion of several of the statutory requirements regarding involuntary civil commitment proceedings, including notice of the pendency of the commitment hearing, we find precedent of this court, with respect to the effect of a court's failure to strictly comply with the notice requirements for involuntary civil commitment hearings, applicable to C.E.'s procedural due process claim in the present appeal. In *In re Splett* (1991), 143 Ill. 2d 225, this court rejected a respondent's argument that his involuntary civil commitment order should be set aside because he was not formally notified of the pendency of the proceedings. This court observed that the respondent had actual knowledge of the proceedings and that he and his attorney were "afforded *** the time to prepare for the proceeding and allowed *** an opportunity to be heard on the disposition of the matter." (*Splett*, 143 Ill. 2d at 232.) This court also found it significant that the respondent did not "contend that he was prejudiced by the lack of formal notice, nor d[id] we discern any manner in which his rights were adversely affected." *Splett*, 143 Ill. 2d at 232.

The instant cause is substantially similar to *Splett*. The record indicates that C.E. and his attorney were aware of the proceedings and were provided ample opportunity to respond to the arguments raised by the other parties to the matter. C.E. does not claim that he was prejudiced by the absence of formal notice, and we are unable to find any prejudice on the present record. Under the circumstances, C.E. cannot properly challenge section 2-107.1 for its lack of specific requirement that the respondent be provided formal notice of the proceedings.

C. Unconstitutionally Vague

C.E. argues that section 2-107.1 is unconstitutionally vague because its terms are too imprecise to allow for common understanding. For example, C.E. points to the phrase "disruptive behavior," and suggests that what some people find "disruptive," others will not, and that as a result, persons of common intelligence must necessarily guess at its meaning. C.E. also observes that the term "threatening behavior" is vague. In addition, C.E. complains that the term "suffering" is ambiguous, and questions whether the term is limited to physical suffering, or whether it also includes emotional suffering. C.E. also argues that the term "deterioration in ability to function" is vague, because it does not specify what kind of deterioration is required or the areas in which deterioration may be significant. This court has previously set forth the guiding principles to determine whether a statute is void for vagueness:

> "A statute is void for vagueness if it ' "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" ' [citation], or if there is an absence of standards restricting the discretion of governmental authorities or courts who apply the law [citations]. ***

> Courts should strive whenever possible to construe a statute so as to uphold its constitutional validity [citations], and a vagueness challenge to a statute will not be upheld if judicial construction of the statute renders it sufficiently definite so as to preclude its arbitrary application [citations]." *People v. Lang* (1986), 113 Ill. 2d 407, 454-55.

We conclude that the phrases at issue in section 2-107.1 are capable of intelligent interpretation when read in the context of the statute and the overall purpose of the legislation. The statute applies where a person who is receiving mental health services is unable to make a decision in his own behalf regarding the administration of psychotropic substances. Section 2-107.1 limits the involuntary administration of psychotropic medication to circumstances where the recipient, while incapacitated, is suffering from one of the specific conditions stated in the statute, *viz.*, a "deterioration of his ability to function, suffering, or threatening or disruptive behavior" (405 ILCS 5/2-107.1(d)(2) (West 1992)), and where these conditions have "existed for a period marked by the continuing presence of the symptoms *** or the repeated episodic occurrence of these symptoms" (405 ILCS 5/2-107.1(d)(3) (West 1992)). Further, it must be demonstrated that the benefits of the psychotropic substances will outweigh the harm that may result from the medication, and that other, less restrictive services have been considered and found ineffective. 405 ILCS 5/2-107.1(d)(4), (d)(6) (West 1992).

When considered in the context of all of the requirements of section 2-107.1, the terms to which C.E. refers are not so vague that they are incapable of common understanding. The pertinent terms must be considered in the context of the mental illness or disability from which the mental health recipient is suffering and for which the psychotropic medication has been suggested. The testi-

mony of mental health professions will serve as adequate and sufficient guidepost for the trial court's determination of whether the recipient's condition satisfies the requirements of the statute. " '[T]he Constitution only requires that the courts make certain that professional judgment in fact was exercised.' " (*Youngberg v. Romeo* (1982), 457 U.S. 307, 321, 73 L.Ed.2d 28, 41, 102 S. Ct. 2452, 2461, quoting 644 F.2d 147, 178.) The statute's terms are not so vague that they defy common understanding in the mental health field. As the court observed in *In re Ingersoll* (1989), 188 Ill. App. 3d 364, 368, "When diagnosing and treating a mental health disorder, it is difficult to determine, diagnose, and treat the disorder because there are so many different abstract signs exhibited by those believed to be afflicted. This is a highly specialized area of medicine which is better left to the experts, who are the most knowledgeable sources of the different diagnoses, treatment, and prognoses."

C.E. also claims that the statute must be considered under a standard of strict scrutiny, because it seeks to proscribe protected first amendment expressions. According to C.E., the section authorizes the involuntary administration of psychotropic medication when the respondent is exhibiting "threatening or disruptive behavior." C.E. contends that by so doing, the statute penalizes protected first amendment rights.

We do not believe that the statute violates constitutionally protected speech rights of mental health recipients. Even assuming *arguendo* that statute's reference to "threatening or disruptive behavior" implicates constitutionally protected "speech," the statute nevertheless survives constitutional scrutiny. In *United States v. O'Brien* (1968), 391 U.S. 367, 376-77, 20 L. Ed. 2d 672, 679-80, 88 S. Ct. 1673, 1678-79, the Supreme Court held:

> "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. *** [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Applying these criteria to section 2-107.1, we conclude that the statutory provision does not impermissibly overburden the free expression rights of mental health recipients who, while incapable to make a decision in their own behalf, have refused the administration of psychotropic substances. The State bears a significant duty to care for those unable to make decisions in their own behalf, under the State's *parens patriae* power. The purpose of section 2-107.1 is not to control or suppress the free speech rights of those receiving mental health services, but rather to ensure their proper treatment so that they may return to productive and self-reliant living as quickly and efficiently as possible. We believe that the statute is narrowly tailored to serve these ends. Consequently, we find C.E.'s argument on this point inadequate ground to hold section 2-107.1 unconstitutional.

D. Equal Protection

We also find no violation of equal protection in section 2-107.1. According to C.E. and his father, the statute impermissibly violates equal protection because it allows forced administration of psychotropic substances to one

who has been under psychiatric care, but does not authorize forced administration of the drugs to one who has never been under psychiatric care. This argument misunderstands the meaning of the phrase "recipient of services" under the Code.

The provisions of the Mental Health Code specifically apply to one who is a "[r]ecipient of services," which is defined as a person "who has received or is receiving treatment." (405 ILCS 5/1-123 (West 1992).) Treatment is defined as "an effort to accomplish an improvement in the mental condition or related behavior of a patient" and "includes, but is not limited to, hospitalization, partial hospitalization, outpatient services, examination, diagnosis, evaluation, care, training, psychotherapy, pharmaceuticals, and other services provided for patients by mental health facilities." 405 ILCS 5/1-128 (West 1992).

Thus, once a person has been examined by a mental health professional, that person is a recipient of services. Thereafter, administration of psychotropic medication against the person's wishes can only be accomplished under section 2-107.1. In order to determine whether the person is in need of psychotropic medication, the person must have been evaluated by mental health professionals. Consequently, section 2-107.1 does not authorize the involuntary administration of psychotropic medication to an individual who has never been accorded psychiatric or other mental health evaluation or treatment.

We agree with the Attorney General that the trial court was in error when it concluded that the statute violates equal protection. The trial court found the statute unconstitutional because the court believed that persons subject to involuntary administration of psychotropic medication are wrongfully deprived of all of the procedural guarantees specified for appointment of a guardian under the

Probate Act. However, there is nothing in section 2-107.1 that prevents or prohibits the trial court from appointing a guardian for the ward, or a guardian *ad litem* for the ward, if the trial court believes such appointment would serve the mental health recipient's interests. See 755 ILCS 5/11a-2, 11a-3, 11a-10 (West 1992) (requirements for appointment of guardian, attorney for ward, and guardian *ad litem*).

Under the Probate Act, the court may, on its own motion, adjudge a person to be disabled, and may appoint a guardian for the ward. (755 ILCS 5/11a-3(a) (West 1992).) In order to be in need of the appointment of a guardian, it must be shown that the ward is a "disabled person," which is defined as follows:

> " 'Disabled person' means a person *** who (a) because of mental deterioration or physical incapacity is not fully able to manage his person or estate, or (b) is mentally ill or developmentally disabled and who because of his mental illness or developmental disability is not fully able to manage his person or estate ***." (755 ILCS 5/11a-2, (West 1992).)

This definition bears substantial similarity to the requirement of section 2-107.1 that the mental health recipient suffer from a "serious mental illness or developmental disability" and that the recipient "lacks the capacity to make a reasoned decision about the [administration of psychotropic] medication." (405 ILCS 5/2-107.1(d)(2), (d)(5) (West 1992).) We also find it noteworthy that the Probate Act provides for the appointment of a limited or temporary guardian, thus providing the ward with the aid and protection of a guardian "upon a showing of the necessity therefore for the welfare and protection of the disabled person *** on such notice and subject to such conditions as the court may prescribe." (755 ILCS 5/11a-4

(West 1992) (appointment of temporary guardian).) Such appointment must be used "only as is necessary to promote the well-being of the disabled person, to protect him from neglect, exploitation, or abuse, and to encourage development of his maximum self-reliance and independence." (755 ILCS 5/11a-3(b) (West 1992).) Appointment of a guardian "shall be ordered only to the extent necessitated by the individual's actual mental, physical and adaptive limitations." (755 ILCS 5/11-3(b) (West 1992).) Such limited or temporary guardianship could include, where appropriate, the power to consent to the administration of psychotropic medication, provided the requirements of section 2-107.1 are satisfied. We cannot say that section 2-107.1 is unconstitutional for its failure to explicitly *require* such guardianship appointments in all instances.

For the reasons stated, we conclude that section 2-107.1 is not unconstitutional on its face. As a result, the judgment of the circuit court is reversed and the cause is remanded for further proceedings consistent herewith.

Reversed and remanded.

APPENDIX B

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT–COUNTY DIVISION

IN THE MATTER OF C.E.,	)	
	)	
ASSERTED TO BE A PERSON IN NEED OF PSYCHOTROPIC MEDICATION	)	
v.	)	NO. 91 COT 06
	)	
ASSISTANT ATTORNEY GENERAL JONATHAN CLARK GREEN, INTERVENOR FOR THE ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES	)	

DECLARATORY JUDGEMENT ORDER

This is an action on a Petition seeking a Declaratory Judgement (Pursuant to Ill. Rev. Stat. ch. 110, par. 2-701 (1991))* that Section 2-107.1, Ill. Rev. Stat. ch. 91½, par. 2-107.1, the recently enacted provision of the Illinois Mental Health Code, is unconstitutional. Petitioners allege that Section 2-107.1 violates State and Federal guarantees of Due Process and Privacy Rights, Equal Protection of the Laws, and Freedom of Speech or of Religion, and other rights guaranteed under the Federal and State Constitutions.

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* Where possible, citation form has been edited to conform with standard usage. In all other respects, Judge Staniec's order of March 30, 1992, is reproduced here as originally entered.

Background

Petitioners for the Declaratory Judgment are C.E., the respondent, and L.E., father of the adult disabled son C.E., who is alleged to be a person in need of psychotropic medication. L.E. is represented by attorney Mark Epstein; Elizabeth Sircher, attorney from the Illinois Guardianship and Advocacy Commission's Legal Advocacy Service, the court appointed counsel represents the alleged disabled C.E. Both petitioned the court to declare Section 2-107.1 unconstitutional, because it violates state and federal Constitutions.

Respondent C.E. was found to be a person subject to involuntary admission on August 29, 1991 pursuant to the Mental Health Code, Section 3-700 et al, and was admitted to Michael Reese Hospital in the care and custody of his father L.E. for treatment. He was found to be mentally ill and dangerous to self and to others. Section 3-907, states in part: "Any person who is under *legal disability* solely by reason of a court order adjudicating him mentally ill, entered prior to January 1, 1964, shall be deemed to be a person under *no legal disability,*". . .unless. . . prior to that date (1-1-64) a hearing is held pursuant to the provisions of the Probate Act of 1975, approved 8-7-75, as now or hereafter amended and a guardian is appointed."

L.E. filed a petition on August 7, 1991, for temporary guardianship only of the person of his son C.E., and for the specific purpose of giving or withholding substituted informed consent to the administration of proposed psychotropic medication. The court, on basis of expert testimony, found that C.E. was competent to give informed consent or refusal to the proposed medication. Temporary guardianship was granted to L.E. by the Mental Health

Court, effective August 29, 1991, and the guardianship order was renewed for sixty day periods.

In the meantime, C.E. has been refusing medical and psychiatric treatment because of his chronic psychotic condition, which is likely to continue and to recur periodically over an extended period of time, and possibly during his lifetime.

Petitioner, L.E., on October 3, 1991, filed a petition pursuant to Section 2-107.1 of the Mental Health Code, seeking authority to exercise substituted judgement in the proposed administration of psychotropic medication upon his son, C.E. He concurrently filed a petition to declare Section 2-107.1 of the Mental Health Code to be unconstitutional.

ISSUE OF STANDING

At the same time, Respondent C.E. through his counsel Sircher, asserted that Petitioner L.E. had no standing to bring a Petition for Declaratory Relief, since standing for such action rested solely with Respondent C.E. The basis for Respondent's contention was that Petitioner has "no interest in the controversy", as defined by the Illinois Supreme Court; that Petitioner possesses no claim, status or right which will be affected by the outcome of the litigation; that provisions of the Probate Act do not confer on a guardian a standing to sue on behalf of his ward, and that such a constitutional right is that of the individual, whether he be competent or incompetent, and not that of the guardian. Based on the above arguments, Respondent requested that the Petition of Guardian L.E. be dismissed.

Intervenor, Attorney General Roland W. Burris, by Jonathan Clark Green, A/A/G, also moved the Court to

dismiss L.E.'s petition to declare Section 2-107.1 unconstitutional, since Petitioner had no standing. The Attorney General also argued that the litigation was not based on "an actual controversy" in existence and that the Petitioner was not "interested" in the purported controversy because he did not possess a personal claim, status, or right, which is capable of being affected by the outcome of the litigation. Counsel Sircher, for the respondent, joined with the Attorney General in the "standing" objection.

Based on pleadings and argument of counsels, and case law, we find and rule that petitioner, as guardian of his son, considering the emergency circumstances and urgency of treating the respondent involuntarily and C.E.'s apparent capacity to consent to or refuse the proposed psychotropic medication, that there is in fact an actual controversy at bar; that the decision of the court would not be merely passing judgment on mere abstract propositions of the law; that the court's determination would involve an actual controversy consisting of a concrete dispute admitting of an immediate and definite determination of the parties' rights; that the resolution of which will aid in the termination of the controversy or at least some part of it; and that the facts and issues in the case are not moot or premature.

As to the "interest" prong of the required element defining "interest," we find and rule that Petitioner did in fact have "interest" in the controversy, and not merely "a curiosity" for the outcome of the controversy, but does possess a personal claim, status and right which is capable of being affected in this case. Accordingly, we find and rule that Petitioner L.E. does have an "interest" in this controversy and has "standing" to bring this action, and to join with the action brought by counsel for the Respon-

dent C.E. Therefore, motions by the Attorney General and Counsel Sircher for the Respondent, to dismiss Petitioner L.E.'s petition to declare Section 2-107.1 unconstitutional is denied.

MENTAL HEALTH CODE SECTION 2-107.1
v.
PROBATE ACT ARTICLE XIa

Petitioner contends that the law for some time has provided a method of intervention, by guardianship, by which the respondent can be assisted out of the psychotic abyss in which his delusions leave him. However, if Section 2-107.1 is deemed constitutional, it renders guardianship no longer available to help his son. Instead, even though the new act was well-intended, it now substitutes a new method of intervention (2-107.1(g)), which for at least respondents like his son in this case is too cumbersome to be effective. Under the Probate Act, if a particular psychiatric treatment was considered usual and ordinary, the guardian had inherent authority to exercise his or her judgment and give substituted consent for the medication. If Electroconvulsive Shock therapy, psychosurgery, or any unusual, hazardous, or experimental services were contemplated, the guardian could only give substituted consent with the specific approval of the court. Now, under Section 2-107.1(g) of the Mental Health Code, a guardian is only authorized to consent to the administration of psychotropic medication under the standards and procedures of said section. The petitioner contends that this in effect negates the authority of the guardian that he previously had under the Probate Act to give substituted consent for antipsychotic medication."

Now, instead of having apparent authority to approve antipsychotic medication or in lieu of requesting approval

for such medication by ordinary motion practice, the guardian must now proceed through an arcane, ambiguous, wasteful and self-defeating procedure, that is subject to simple and logical sabotage by a knowledgeable and willing respondent or attorney. The petitioner argues that it is a procedure that elevates form over substance and replaces substance with form.

The petitioner then proceeded to outline the differences in the procedure that was followed under the Probate Act and the present requirements under 2-107.1—which we need not state in this opinion at this point—which we later detail. Suffice it to say, that petitioner outlined numerous protections for respondents that are no longer provided under Section 2-107.1 as they were under the Probate Act procedure.

CONSTITUTIONAL ISSUES & PETITION FOR DECLARATORY RELIEF

Having disposed of the issues of "standing" and "controversy", we next move to the question of whether the recently enacted Section 2-107.1 is unconstitutional because it is violative of certain guarantees under the state and federal constitutions. The petition by L.E. alleges that his ward is refusing psychotropic medication. That he seeks a court order authorizing him to provide substituted judgement of behalf of his ward, and to authorize a duly selected attending physician, and medical/nursing personnel operating under said named physician's direction to administer psychotropic medication to C.E. against his will. Petitioner further alleges that C.E. is not "legally disabled" as that term is used in Section 11a-1, *et seq.*, of the Probate Act, Ill. Rev. Stat. ch. 110½, par. 11a-1 *et seq.* (1991). Also, that Section 2-107.1 violates patient's right to refuse medical treatment, a right guaranteed in

the Right to Privacy provision and the guarantee of Due Process afforded by both the Illinois and the United States Constitutions. Moreover, that said section of the Mental Health Code, violates the right to Equal Protection of the Laws afforded by both the Illinois and United States Constitutions; and that an actual controversy does exist which warrants a court determination of the issues raised. He requests that the court declare Section 2-107.1 is unconstitutional.

Counsels, on behalf of the guardian and for the respondent, request Declaratory Relief that Section 2-107.1 does violate constitutionally protected liberty interests of the Respondent, under the due process clause of the 14th amendment, in avoiding the unwanted psychotropic medication. As in *Winston v. Lee*, 470 U.S. 753 (1984), and *Schmerber v. California*, 384 U.S. 757 (1966), counsels argue that forcible injection of medication into an non-consenting person's body represents a substantial and grave interference with that person's liberty. Furthermore, counsels cite the holding of the Supreme Court in *Washington v. Harper*, 110 S.Ct. 1028, 1041 (1990), in which the high court enumerated numerous risks from psychotropic medication. That such drugs do alter the chemical balance in a patient's brain, leading to permanent or temporary changes, even though they are intended to be beneficial, in the person's cognitive and mood processes and behavior. The court went on to say, that while the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal side effects. They can cause negative side effects, such as acute dystonia, akathesia, neuroleptic malignant syndrome, and Tardive Dyskinesia which is irreversible in many cases. That 10% to 25% of the patients treated with antipsychotic drugs exhibit T.D. symptoms, out which 60% is mild or minimal, and about 10% can be characterized as

severe. In the *Washington v. Harper* case, we note that the U.S. Supreme Court, in reversing the state Supreme Court, did so in the context of Harper, as a prisoner; that the "extent of a prisoner's rights under the (Due Process) clause, to avoid the unwanted administration of antipsychotic drugs, must be defined within the context of the inmate's confinement." Therefore, the court stated it is legitimate, indeed necessary, to consider the State's interest in prison safety and security. Therefore, in considering the proper standard for determining the validity of a prison regulation, claimed to infringe on an inmate's constitutional right, it is necessary to ask whether the regulation is "reasonably related to legitimate phenological" interest." The majority in the *Harper* case, proffered the "reasonableness" standard as being applicable (in such penal circumstances), even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review. We believe that a more "rigorous standard" must be used in our instant case. It should be noted, that the minority of the *Harper* Court were even more troubled with the risks of psychotropic drugs that were enumerated in the majority opinion.

GRAVE RISKS AND SIDE EFFECTS FROM MEDICATION

It is noteworthy that the *Harper* court minority, cited numerous other side effects from medication that alters the chemical balance in a patient's brain, which can cause irreversible and even fatal side effects, thus:

> "Prolixin acts at all levels of the central nervous system as well as on multiple organ systems. The minority stated, it can induce catatonic-like states,

alter electroencephalographic tracings, and cause swelling of the brain. Also, adverse reactions, include drowsiness, excitement, restlessness, bizarre dreams, hypertension, nausea, vomiting, loss of appetite, salivation, dry mouth, perspiration, headache, constipation, blurred vision, impotency, eczema, jaundice, tremors, and muscle spasms. As with all psychotropic drugs, Prolixin may cause Tardive Dyskinesia, and often irreversible syndrome of uncontrollable movements that can prevent a person from exercising basic functions such as driving an automobile, and neuroleptic malignant syndrome, which is 30% fatal for those who suffer from it. The risks of side effects increases over time."

We take judicial notice of the fact that reasonable degree of certainty in the state-of-the-art of the psychiatric profession in diagnosing a mental disorder, treating and prescribing appropriate psychotropic medication for the treatment of a given disorder is far less certain than the state-of-the-art in general medicine and surgery. This would tend to increase the unpredictability of the outcome of any prescribed psychotropic medication, and its side effects.

Because of this fact, it is troublesome to this court that there is a lack of adequate protection and fixed standards in the provisions of 2-107.1, nor even in the Probate Act process involving serious invasive psychotropic medication of a respondent. Even in the more predictable and certain state-of-the-art in general medicine and surgery they currently require second medical and surgical opinions of physicians and surgeons, before inpatient services are provided and costs become reimbursable under health care insurance policies. While, in mental health profession, procedures often are undertaken on the basis of far less certainty and far less predictable psychiatric outcome—which at times can be more devastating to the patient from risks

and side effects that can be irreversible. We recommend that protective fixed standards ought to be enacted as a part of any new legislation in the Mental Health Code. They should require courts, inter alia, to follow fixed standards that will offer all of the protective features of the Probate Act, including the use of guardian, guardian ad litem and second psychiatric opinion before substituted judgment authority is granted to the guardian to consent to psychotropic medication.

The *Harper* Court's minority stated, that a "competent" individual's right to refuse such medication is a fundamental liberty interest deserving the highest order of protection. *Harper*, 110 S.Ct. at 1047. It is important to contrast the *Harper* case with the case at bar. This respondent is not a prisoner. Section 2-107.1, which is being challenged constitutionally, is not designed for incarcerated persons and the use of the "standard of reasonableness" as in *Harper*. The "standard of reasonableness" is not applicable in this instant case, since a competent non-incarcerated individual's right to refuse psychotropic medication is an aspect of liberty requiring this court to apply the highest order of scrutiny and protection under the Fourteenth Amendment.

We agree in part with the *Harper* minority opinion, that "Every violation of a person's bodily integrity is an invasion of his or her liberty." The invasion is particularly intrusive if it creates a substantial risk of permanent injury and premature death" (and we add that on occasions permanent changes of the body, mind, mood, behavior and personality can be caused that are irreversible.") "Moreover, any such action is degrading if it overrides a competent person's choice to reject a specific form of medical treatment. And when the propose or effect of forced drugging is to alter the will and mind of the subject, it con-

stitutes a deprivation of liberty in the most literal and fundamental sense. The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438 (1928). This leads to the logical conclusion that liberty of citizens to resist the administration of mind altering drugs arises from our Nation's most basic fundamental values.

Section 2-107.1 of the Illinois Mental Health and Developmental Disabilities Code provides that "psychotropic medication may be administered to a recipient of services against his will under the standards and procedures of that Section." Recipient of services is defined in the Code as a person who has received treatment or habilitation, which includes one who might be treated with psychotropic medication and other treatment protocol.

In *Cruzan v. Director, Missouri Department of Health*, 100 S.Ct. 2841 (1990), the U.S. Supreme Court, after reviewing favorably the common-law cases supporting a right to treatment, as well as the constitutionally-based cases supporting the refusal right, stated: "The Fourteenth Amendment provides that 'no State shall deprive any person of life, liberty, or property, without due process of law.' The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." This supports the proposition that adults have a right to make their own decisions as to how their personal life shall be managed, and in particular in circumstances, such as in the case at bar, what medical treat-

ment to undergo. Occasionally, an adult's autonomy and responsibility has to be restricted, for those who need protection, such as mentally deficient persons or certain disabled individuals and to provide appropriate surrogate personal and financial care and protection which is entrusted to the state under its guardianship laws. However, before such a person can be deprived of his or her autonomy the court must first determine that he or she is in fact "legally disabled."

But, even if the court finds the respondent to be "disabled" under Ill. Rev. Stat. ch. 110½, par. 11a-2, it does not mean that the respondent will be ipso facto adjudicated "legally disabled" or "incompetent." The Court may adjudge a person to be a disabled person because he or she lacks sufficient understanding or capacity to make or communicate responsible decision concerning the care of his or her person. A guardian of his or her estate can be appointed by the court if because of the disability one is unable to manage the state of financial affairs, or a court may appoint a guardian for both the person and the estate.

Thus, if a person is found disabled and in addition is found to need personal protection, the court may then and only then, appoint a guardian of the person. Until such time as one is specifically found disabled and also in need of a guardian, one is always presumed to be competent. The Mental Health Code, Section 2-101, expressly recognizes the protections of the guardianship laws and the presumptions of competence that: "No recipient of services shall be presumed legally disabled except as determined by a court."

"Legal disability," was and is still the function of adjudication under the guardianship laws. However, the newly

enacted Section 2-107.1 fails to require an adjudication of "legal disability" as a prerequisite to forcible medication. Thus, Section 2-107.1 allows the forcible medication of competent patients, even if the patient is not a prisoner, and even in the absence of emergency circumstances.

Until the passage of section 2-107.1 of the Mental Health Code, only pursuant to the guardianship laws could an individual have been administered psychotropic medication against his will. All of the following must first have occurred: *first*, the individual must have been found "disabled"; *next*, the court or jury must have determined that the disabled person was in need of a guardian for his own protection; and, *finally*, the appointed guardian—(after first determining the ward's best interest, and, in particular, what the ward would want done had he been competent)—must have *decided independently* to grant substituted informed consent to the forcible administration of medication.

The Mental Health Code, in section 2-107, has long recognized the intimate role of the guardian in making these difficult substitute medical decisions for an incompetent ward:

> "An adult recipient of services, or, if the recipient is under guardianship, the recipient's guardian, shall be given the opportunity to refuse generally accepted mental health or developmental disability services, including but not limited to medication. If such services are refused, they shall not be given, unless such services are necessary to prevent the recipient from causing serious harm to himself or others. . ."

Recent Illinois case law has confirmed that absent emergency circumstances, where the individual poses an immediate threat of physical harm to himself or others, the individual has an absolute right to refuse medication,

with only the following single exception, pursuant to the parens patriae doctrine: if (a) the individual has been adjudicated to be a disabled person and a guardian has been appointed for the individual, and the guardian has granted substituted consent to the medication. *Matter of Orr*, 176 Ill. App. 3d 498, 531 N.E.2d 64 (4th Dist. 1988).

The guardian is even given authority to make an informed decision of whether or not to refuse services on the basis that "healing through prayer alone" is more appropriate for his ward. The Mental Health Code specifically recognizes the right of certain religious recipients, or if the recipient has been adjudicated disabled the recipient's guardian, to forego treatment in favor of healing through prayer (Section 2-102(b). It is clear, that prior to passage of the Section 2-107.1, except in emergency circumstances, a competent recipient of services had an absolute right to refuse forced medication. However, under the guardianship laws, if the recipient had been adjudicated incompetent and a guardian appointed, then that right to refuse treatment continues in effect, but is passed on to the guardian.

The importance of the guardian's functions and responsibilities (an appointment which is not required by 2-107.1) in closely monitoring the psychotropic medication and related treatment of the recipient is further confirmed by Section 2-102(a) of the Mental Health Code, which states, "that services shall be provided with adequate and humane care and services in the least restrictive environment, pursuant to an individual services plan, which shall be formulated and periodically reviewed with the participation of the recipient to the extent feasible and where appropriate, *such recipient's nearest kin or guardian.*"

Section 2-107.1 by-passes the guardianship laws and the guardian, and it thereby also by-passes the recipient's con-

stitutional rights to refuse treatment, whether that is done by such right expressed individually or by the individual's guardian. Section 2-107.1 presents a scheme by which a court order is entered in the absence of an adjudication of legal disability and in the absence of the appointment of a guardian, and authorizes a clinician to forcibly administer psychotropic medication to a recipient despite his refusal and legal capacity to give informed refusal. This conflicts with Section 2-101 of the Mental Health Code where in the absence of adjudication of disability, the recipient remains presumptively competent. Yet, he can be involuntarily administered psychotropic medication even under circumstances of a non-emergency. Section 2-107.1 fails to require (a) adjudication of disability and the (b) appointment of a guardian. It only requires a finding that the recipient lacks the capacity to make a reasoned decision about the medication. This finding of "lack of Capacity to make a reasoned decision" is not a constitutional equivalent to an adjudication of disability and appointment of a guardian, and therefore is constitutionally insufficient. It should be noted, that Section 2-107.1 does not have a fixed requirement for appointment of a guardian, who may per court order authorize forced medication in an appropriate case, on the basis of substituted judgment on behalf of the incompetent. Under the then existing procedure, prior to Section 2-107.1, the guardian had the duty and responsibility to consider the religious and spiritual beliefs, the mores, the past behavior and the expressions of principles and preferences of the ward, before determining whether to authorize acceptance or refuse recommended medical treatment being proffered. This action would be subject to court review, to determine what the ward would have wanted were he or she competent.

Section 2-107.1 does the opposite. First, it deprives the guardian, if one has been appointed under the Probate

Act (none is required, under 2-107.1) of all independent authority to make decisions regarding consent to psychotropic medications. It states: ". . .2-107.1(g) A guardian shall only be authorized to consent to the administration of psychotropic medication under the standards and procedures of this Section."

In other words, even if despite all of the substantive and procedural protections of the guardianship laws, a respondent had been found "disabled" and a guardian was previously appointed for him under the Probate Act, and the guardian has determined that granting substituted informed consent to psychotropic medication is appropriate, still the guardian would not be able to approve the medication. The guardian would now still have to file a petition for a special order pursuant to section 2-107.1 and abide, also, by all of the procedural and substantive provisions of that law, including, for example, new service of process, new notice to concerned individuals, appointment of new counsel, appointment of new reviewing experts, and the possibility of a new jury trial—and, if the ward's needs are continuing, (as many are), then the guardian must repeat this process every 90 days.

On the other hand, let us assume that the guardian has carefully considered the ward's best interests, including the ward's behaviors, beliefs, principles and expressions when competent. And let us assume that in light of these considerations, the guardian has decided to refuse to give consent to forced psychotropic medication, perhaps because, or partially because, when competent, the ward was an adherent of a well-recognized religious denomination which taught reliance upon healing through spiritual means alone. Yet, even though the guardian is a sworn officer of the court, charged with the care and custody of the ward, now according to section 2-107.1 *any person*

18 years of age or older. . .may petition the circuit court for an order authorizing the [forcible] administration of psychotropic medication. . ."

PROCEDURE UNDER 2-107.1

If the petitioner proves his case, the court designates a person authorized to administer the medication. The petitioner has only to prove the following: (1) the recipient has a serious mental illness or developmental disability, (2) because of which the recipient exhibits deterioration of his ability to function, or exhibits suffering, or exhibits threatening or disruptive behavior; (3) the mental illness or developmental disability has existed for a period marked by the continuing presence of the symptoms or the repeated episodic occurrence of the symptoms; (4) the benefits of the psychotropic medication will outweigh the harm; (5) the recipient lacks the capacity to make a reasoned decision about the medication; and (6) other less restrictive services have been explored and found inappropriate.

The provision requiring proof that "the benefits of the psychotropic medication will outweigh the harm" clearly establishes a scheme by which the key issue really becomes the "best interests" of the disabled ward, rather than the key issue being the fulfillment of the ward's competent will by applying the doctrine of "substituted judgment".

Yet, according to The United States Supreme Court, in *Cruzan v. Director, Missouri Department of Health*, 110 S.Ct. 2841 (1990), the Illinois Supreme Court has heavily weighed-in in favor of the "substituted judgement" doctrine.

Counsel for the Guardian of C.E. aptly argues that the following substantive and procedural protections provided

by the existing guardianship laws are absent from Section 2-107.1 of the Mental Health Code, which we agree are necessary requirements to provide Constitutional rights of Due Process, Right of Privacy, and Equal Protection of the Laws;

GUARDIANSHIP LAWS

Among other protections, the guardianship laws provide:

> Guardianship shall be utilized only as is necessary to promote the well-being of the disabled person, to protect him from neglect, exploitation, or abuse, and to encourage development of his maximum self-reliance and independence. Guardianship shall be ordered only to the extent necessitated by the individual's actual mental, physical and adaptive limitations. Ill. Rev. Stat. ch. 110½, par. 11a-3(b) (1991).

No equivalent provision applies to section 2-107.1 of the Mental Health Code. The guardianship laws provide for temporary guardianship for respondent's welfare and protection, in the event he needs treatment on short notice, before there is time for a full hearing. Ill. Rev. Stat. ch. 110½, par. 11a-4 (1991). Section 2-107.1 of the Mental Health Code has no equivalent provision.

The guardianship laws provide that the court shall not appoint as guardian an agency which is directly providing residential services to the ward. Ill. Rev. Stat. ch. 110½, par. 11a-5(b) (1991). This is obviously to avoid a conflict of interest. Yet, under Section 2-107.1, it is precisely the person administering the forced medication that is authorized to make the decisions regarding medication for the ward. Section 2-107.1 virtually requires a conflict of interest on the part of the person designated to administer the medication. The person becomes both treatment-recommender and decider.

The guardianship laws provide that a person, while of sound mind and memory, may designate in writing a preference for a guardian, and the court adjudicating guardianship must take such preference into account. Ill. Rev. Stat. ch. 110½, par. 11a-6 (1991). By by-passing the guardian entirely, Section 2-107.1 also by-passes this expressed preference of the recipient.

Under the guardianship laws, certain issues are required to be raised by petition. Ill. Rev. Stat. ch. 110½, par. 11a-8 (1991). These important issues now are absent from the forced medication proceeding. Among other things, the petition for guardianship must state: (a) the relationship and interest of the petitioner; (b) the name and post office addresses of the respondent's nearest relatives, for the purpose of notifying them of the proceedings; (c) the name and post office address of any existing guardian; (d) the name, address, age and occupation of the proposed guardian.

The petition for adjudication of disability and for appointment of a guardian must be accompanied by a physician's report which contains, among other things, the following; (a) a description of the nature and type of the respondent's disability; (b) evaluations of the respondent's mental and physical condition and, where appropriate, educational condition, adaptive behavior and social skills, which have been performed within 3 months of the date of the filing of the petition; (c) an opinion as to whether guardianship is needed, the type and scope of the guardianship most suitable living arrangement and, where appropriate, treatment or habilitation plan for the respondent, and the reasons therefore; (e) the signatures of all persons who performed the evaluations upon which the report is based. Ill. Rev. Stat. ch. 110½, par. 11a-9 (1991).

Perhaps most importantly, while Section 2-107.1 does make provision for appointment of counsel for the respondent, as do the guardianship laws, Section 2-107.1 fails to make any provision regarding appointment of a guardian ad litem. Under the guardianship laws, unless the court determines that a guardian ad litem is necessary for the protection of the respondent, or for a reasonably informed decision on the guardianship petition, the court must appoint a guardian ad litem. In making its investigation for its report to the court, the guardian ad litem may consult with an appropriate expert in the area of the respondent's particular alleged disability. The guardian ad litem personally observes the respondent prior to the hearing and informs the respondent of his rights. Ill. Rev. Stat. ch. 110½, par. 11a-10(a) (1991).

At the guardianship hearing, the court inquires regarding: (a) the nature and extent of respondent's general intellectual and physical functioning; (b) the extent of the impairment of his adaptive behavior if he is developmentally disabled, or the nature and severity of his mental illness if he is mentally ill; (c) the understanding and capacity of the respondent to make and communicate responsible decisions concerning his person; (d) the capacity of the respondent to manage his affairs; the appropriateness of proposed and alternate living arrangements; and (f) any other area of inquiry deemed appropriate. Ill. Rev. Stat. ch. 110½, par. 11a-11(e) (1991).

Under the guardianship laws, the Order of Appointment of a Guardian must indicate whether the disabled person is totally without capacity or only partially so, and, if only partially without capacity, then only a limited, not plenary, guardian is appointed, and the court must, in writing, state the factual basis for its findings and the limits of the duties and powers of the guardian and the legal dis-

abilities to which the respondent is subject. Whom the court selects as guardian is in the discretion of the court, but the court must give due consideration to the preferences of the disabled person. Ill. Rev. Stat. ch. 110½, par. 11a-12 (1991).

Under the guardianship laws, absent specific court order to the contrary, the guardian has no authority regarding personal or health care matters where the respondent has validly executed a durable power of attorney for health care. Ill. Rev. Stat. ch. 110½, par. 11a-17(c) (1991). This provision emphasizes the priority in our law of fulfilling the respondent's competent wishes, even to the exclusion of the respondent's presumed "best interests." Section 2-107.1 takes no cognizance whatever of a validly executed durable power of attorney, and, by so doing, completely neglects the respondent's liberty interest in his own autonomy.

Under the guardianship laws, the ward may request at any time that the court modify or revoke the authority of the guardian, and such request may be communicated to the court or judge by any means, including but not limited to informal letter, telephone call or visit. The court must conduct a hearing on such request. The court may appoint a guardian ad litem to investigate such request and report thereon, and to prepare the ward's petition and render such other services that the court directs. Ill. Rev. Stat. ch. 110½, par. 11a-20 (1991). Section 2-107.1 of the Mental Health Code provides no equivalent protection to the person who has been ordered, against his will, to receive psychotropic medication.

In all these ways, both substantive and procedural, Section 2-107.1 fails to give the respondent's liberty interest its proper due under the constitution.

Pursuant to Section 2-107.1, after the order is entered, the authority to forcibly medicate becomes solely that of the person designated by the court to administer the medication. Yet that person, unlike a guardian, the person designated is not an officer of the court. He is not charged with any particular standard of care, or, indeed with any particular duties. He is not even required to be a party to the suit, and jurisdiction over the person is ambiguous and questionable.

ARGUMENT OF ATTORNEY GENERAL

Intervenor, Attorney General of Illinois, cites *Cruzan* as his authority for the proposition that Section 2-107.1 does not violate constitutional rights of this instant recipient, because the *Cruzan* Court distinguished in its opinion an incompetent person's right to refuse medical treatment from a competent person's right to refuse. We agree with Petitioner C.E.'s argument, that Intervenor's reliance on *Cruzan* opinion being applicable in this instant case is misplaced, because the *Cruzan* Court sought to give effect to the incompetent person's wishes regarding her treatment. In the case at bar, Section 2-107.1 would override the competent person C.E.'s wishes to refuse psychotropic medication, because Section 2-107.1 does not mandate adjudication of incompetence to determine whether surrogate may give informed consent or refusal. Also, the *Cruzan* Court faced two competing State interests; a) the preservation of human life and b) the protection of the personal decision to refuse medical treatment. In this present case, the State's interest in preserving human life is not at issue and 2-107.1 that we have at issue, ignores rather than protects, as in *Cruzan*, the personal decision to refuse treatment.

The *Cruzan* Court held that a competent person has a constitutionally protected liberty interest in refusing, for themselves, unwanted medical treatment. The Court then determined that an incompetent person's guardian could exercise the incompetent's right to refuse medical treatment such as hydration and nutrition. Furthermore, *Cruzan* held that by clear and convincing evidence of the patient's intentions, the Missouri law did not violate the patient's constitutional right to refuse treatment.

It is noted that the *Cruzan* Court highlighted the constitutional importance of determining the wishes expressed by the patient while "competent" in its opinion in three instances. In sharp contrast, Section 2-107.1 does not require a determination of, and gives no credence to and no protection to the recipient's treatment wishes, which is an unconstitutional deprivation of due process. Section 2-107.1 gives unconstitutional effect to artificial "substituted judgment" standard, by giving effect to the wishes of the Court or to the wishes of the petitioner who may have very little if any information about the recipient's wishes or to the wishes of the patient's psychiatrist for a patient who has not been determined incompetent to make his own decision. Section 2-107.1 does not incorporate safeguards that would effect a true substituted judgment standard and provide for a mandatory determination of competence before an "informed decision" regarding refusal of consent is made.

LONGEWAY AND GREENSPAN

Neither *Longeway* nor *Greenspan* support the constitutionality of Section 2-107.1 as Intervenor argues, since the cases were resolved by our Supreme Court on common

law principles, therefore the Supreme Court found no need to address constitutional principles. We find nothing in those opinions that suggest that the Court would find Section 2-107.1 constitutional.

RIGHT OF PRIVACY

On the issue of Right of Privacy, the Petitioner cites that Section 2-107.1 violates this constitutional guarantee under Article I, Section 6, which includes the privacy right to refuse medical treatment, such as is in issue in this case. Section 6, guarantees that "The people shall have the right to be secure in their persons. . .against. . . invasions of privacy. . ." We believe that there can hardly be a greater invasion on the privacy of a person's body and mind than to force an unwilling and unconsenting person to be medicated despite his known refusal, with psychotropic drugs that can and often do alter the mind, body, mood, central nervous system, conduct, behavior and other characteristics, temporarily or permanently with potentials of great irreversible risks of side effects and great discomfort, anxiety and fear.

EQUAL PROTECTION

Intervenor argues that all respondents in 2-107.1 hearings are "recipients of services" as defined in the Mental Health Code; that 2-107.1 creates no Equal Protection problem between "recipients" and "non-recipients" because expert testimony is required in all medication hearings, basing it on Section 3-807, which he argues is incorporated by Section 2-107.1. However, a careful reading of Section 3-807 clearly states that it requires expert testimony *only* in commitment hearings in order to determine whether a person is "subject to involuntary ad-

mission." We disagree with Intervenor's analysis of Section 3-807, that Section 2-107.1 requires expert testimony for the medication hearings and that the experts used would be required to render their expert opinion and therefore they would necessarily have to personally examine the respondent. We are aware that psychiatric expert witnesses are not necessarily required to base their professional opinion on their own personal observations and evaluation of recipient of services. They may, according to professional custom and prevailing practices of psychiatrists, base their opinion on hearsay information obtained in or out of the court, and on the observations and opinions of other experts and lay people. *Wilson v. Clark*, 84 Ill. 2d 186, 417 N.E.2d 1322 (1981).

We believe that 2-107.1 does violate the Equal Protection clause because it treats mentally ill recipients differently than similarly situated other non-recipients.

Intervenor concludes erroneously, in his argument, that because 2-107.1 is now the exclusive legal procedure for the involuntary administration of psychotropic medication in non-emergency circumstances, that no Equal Protection conflicts arise between 2-107.1 and the Probate Act. We disagree. The Probate Act requires the appointment of a guardian, who exercises patient's statutory and constitutional rights, in the manner in which the patient would exercise those rights if competent, under the substitute judgment standard. The patient's guardian could exercise the patient's right to refuse medications, if the patient were named a respondent in a 2-107.1 hearing would have no surrogates who could assert respondent's rights to refuse or accept proffered treatment. We believe since Section 2-107.1 has no provision that mandates appointment of a guardian, that lack of such a surrogate would be and is a violation of a fundamental liberty interest.

PERSONAL LIBERTY AND FUNDAMENTAL HUMAN RIGHTS

The concept of personal liberties and fundamental human rights, entitled to protection against overboard intrusion or regulation by government, is not limited to those expressly mentioned in either the Bill of Rights or elsewhere in the constitution but instead extends to basic values implicit in the concept of ordered liberty and to basic civil rights of man. *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Carmel-by-the Sea v. Young*, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970).

We recognize the basic principle, which underlies the entire field of legal concepts, pertaining to the validity of legislation, that by virtue of the enactment of the legislation it is presumed to be constitutional. In every case where a question is raised as to the constitutionality of an act, as it is being done in this case at bar, the court must employ this doctrine in scrutinizing the terms of the law. We are cognizant of the fact that courts have enunciated the fundamental rule that there is a strong presumption in favor of the constitutionality of a legislative enactment. *Chicago v. Ames*, 365 Ill. 529, 7 N.E.2d (1937). Therefore, all statutes are of constitutional validity unless they are shown to be invalid, *Lane v. Dorman*, 4 Ill. 238 (1841), unless the statue appears *patently* unconstitutional *on its face* and then it is adjudicated to be in whole or in part in conflict with express or implied provisions of the paramount law or otherwise inoperative. The presumption is generally held applicable to legislation of all kinds. Although the presumption of constitutionality of legislation is a strong one, *State ex rel. Jackman v. Court of Common Pleas*, 9 Ohio St. 2d 159, 224 N.E.2d 906 (1967), this presumption is not conclusive, for it is a rebuttable pre-

sumption of fact, *Borden's Farm Prod. v. Baldwin*, 293 U.S. 194 (1934). The presumption of constitutionality may be overcome by a showing that the statute operates to deprive one of property without due process of law or that any of the guarantees of the constitution have been violated. *Paley v. Bank of America National Trust and Savings Association*, 159 Cal. App. 2d 500, 324 P.2d 35 (1958). Therefore, the ultimate determination of the constitutionality of any act of the legislature rests with the courts. *State ex rel. Troy v. Yelle*, 27 Wash. 2d 99, 176 P.2d 459 (1947).

The only limitation under the due process clause upon the legislature's choice of means to attains a permissible end is that the means chosen must not be so far beyond the necessity of the case as to be an arbitrary exercise of governmental power. *Allbritton v. Winona*, 181 Miss. 75, 178 So. 799 (1938). In determining what is or what is not due process as it affects the ordinary rights of citizens, we must generally look to see whether the legislation which affects or trammels those rights is reasonably related to and designed to protect the health, safety morals, or public welfare of the people or any portion of them. *State of Utah v. Mason*, 78 P.2d 920 (Utah 1938).

While the Illinois Supreme Court declared there is a "common Law right to refuse medical treatment" (*Washington v. Harper* and *Cruzan*), it is now clear that the right to refuse treatment—and in particular the right to refuse forced psychotropic medication—is not merely a common law right; rather, it is a liberty interest protected by the Due Process Clause of the 14th Amendment to the Constitution; and when that liberty interest is the interest of a non-prisoner—as it is in this case at bar—it is deserving of the highest order of protection. For reasons herein indicated, under the scrutiny of this highest

order of protection, Section 2-107.1 must fail. And in this case it must fail for not only one but two reasons. It authorized forcible medication on individuals presumed competent and as for incompetent individuals, the Section bypasses the given individual's right to have his duly authorized surrogate to exercise his right to refuse psychotropic medication, based upon that surrogate's application of the substituted-judgment theory.

PRIVACY & DUE PROCESS LIBERTY INTEREST

In *In re Estate of Greenspan*, 137 Ill. 2d 1, 558 N.E.2d 1194 (1990), the Illinois Supreme Court stated that no right is held more sacred than the right of every individual to the possession and control of his own person. It is clear from this pronouncement that the right to refuse treatment is implicit in the concept of ordered liberty and therefore is protected by the State Constitution. *Matter of Orr*, 176 Ill. App. 3d 498, 531 N.E.2d 64 (4th Dist. 1988) the Appellate Court relied upon constitutional principles in finding that Orr had a right to refuse medical treatment under the state constitutional guarantees of privacy and due process. In cases in other states, courts' rulings have supported the right of an individual to refuse medical treatment under due process, the right to privacy and have found that this right is coextensive with the common law right to refuse medication, and that it also extends to incompetent persons. *Corbett v. D'Alessandro*, 487 So.2d, 368 (Fla. Ct. App. 1986); *Rogers v. Commissioner of the Department of Mental Health*, 390 Mass. 489, 458 N.E.2d 308 (1983); *Jarvis v. Levine*, 418 N.W.2d 139 (Minn. 1988); *Rivers v. Katz*, 67 N.Y.2d 485, 495 N.E.2d 337 (1986).

If the constitution recognizes the right of an individual to make decisions about his life out of respect for one's dignity and autonomy as it did in *Cruzan*, it appears clear that interest is no less significant when the individual is mentally ill, as C.E., is in this instant case, but not found incompetent to make an informed decision, whether to accept or refuse medical treatment, and to accept whatever consequences arise from his decision. He must have this right without governmental interference.

The Illinois Constitution mirrors the U.S. Constitution in its guarantee of due process of law. Ill. Const. art. I, sec. 2. Therefore, the right to refuse unwanted medical treatment under the State Constitution must equal that of the Federal Constitution.

The State argues that Section 2-107.1 reflects its compelling interest under the doctrine of parens patriae or police power. But Section 2-107.1 serves neither purpose here, since the State's interest under its police power only materializes when an emergency situation exists that threatens the safety of others, such as in *Washington v. Harper*, 494 U.S. 210 (1990) which are not the circumstances in the case at bar, nor is it applicable under the parens patriae, since C.E. has not been found incompetent. In emergency situations, subsection (h) authorizes involuntary medication only under Section 2-107.

SUBSTANTIVE AND PROCEDURAL DIFFERENCES BETWEEN SECTION 2-107.1 AND THE PROBATE ACT

We believe that Section 2-107.1 is unconstitutional because it denies C.E. and all other such respondents the equal protection of the laws as guaranteed by both the U.S. Constitution and the Illinois Constitution. A basic

tenet of equal protection is that persons similarly situated will be similarly treated under the law. Assuing arguendo, that adjudications under Section 2-107.1 and the Probate Act are adjudication of *legal* incompetence, which C.E. does not admit, then respondents in both proceedings are similarly situated and therefore must be treated similarly under the law. However, there is a great disparity between the two acts. The respondents in Probate proceedings, receive many procedural protections that are not afforded to respondents in 2-107.1 proceedings.

Under the Probate Act, respondents must be personally served with a copy of the petition and summons; 2-107.1 contains no requirement for notice or service of any kind. Under Probate Act, the respondent, while of sound mind, may designate who will be appointed his guardian. Even after the respondent has been ruled to be disabled, the court must still given due consideration to the preference of the respondent as to whom he wishes to be appointed as his guardian. The guardian is required to give effect to the respondent's wishes and his rights through the use of the substituted judgment standard. Under Probate Act, to avoid obvious conflicts of interest, the guardian cannot be an agency directly providing residential services to the respondent. In contrast, 2-107.1 does not provide safeguards for appointment of a non-conflict of interest guardian or surrogate decision-maker who would is authorized to use substatuted judgment in exercising respondent's rights; the respondent has no role in determining who will be appointed to administer medication to him under the provisions of Section 2-107.1. The person authorized to medicate respondent could indeed be the one providing residential services to the respondent, creating a conflict of interest situation, which the Probate Act seeks to avoid.

A conflict of interest may arise when medical professional must treat unwilling patients and are charged with maintaining order or in curtailing patient disturbances in hospital settings. There may be a propensity on the part of the clinician to engage in over-medication or to engage in mass medication to compensate for personnel shortages and not for valid clinical needs of respondents.

Under the Probate Act, the guardian has no power to act on any matter covered by a power-of-attorney previously executed by the respondent. Section 2-107.1 does not relate to any possible power-of-attorney that a respondent may have executed by which he may have authorized involuntary medication. Under the Probate Act, the petition must give the names and addresses of the respondent's nearest relatives or existing guardian for purposes of notifying them of the proceedings. There is no similar protective requirement in 2-107.1. Under the Probate Act, the petition must be accompanied by a physician's report, detailing the respondent's alleged mental disability and offering an opinion whether guardianship is needed. There is no similar provisions in 2-107.1. Under the Probate Act, the guardian must take an oath of office, is designated an officer of the court, and owes a fiduciary duty to the respondent. Again, 2-107.1 contains no similar requirement for the person authorized to administer medication.

The U.S. Supreme Court ruled that persons may not be deprived of procedural protections merely by an arbitrary decision of the State seeking to rely on one statute rather than another. *Humphrey v. Cady*, 405 U.S. 504 (1972). Here, C.E. and other respondents are denied many of the substantive and procedural rights outlined above, merely because the State arbitrarily decided to file a 2-107.1 petition rather than a petition for the appointment

of a guardian under the Probate Act, Ill. Rev. Stat. ch. 110½, sec. 11a-1 *et seq.* (1991).

In the alternative, if an adjudication of incompetence under 2-107.1, arguendo, does not render respondents *legally incompetent*, then 2-107.1 respondents remain legally *competent*. Under this view, Section 2-107.1 is even more an egregious violation of equal protection, since unwanted medication is forced on such legally competent individuals without lawful justification.

SUMMARY

In considering the pleadings and arguments of counsel for the respondent, counsel for the guardian of the ward, (who has not been adjudicated legally incompetent to make an informed decision to refuse or accepted proffered psychotropic medication) and of the Attorney General as intervenor on behalf of the Department of Mental Health and Developmental Disabilities, we are clearly and convincingly persuaded to the conclusion that Section 2-107.1, enacted on August 13, 1991, is unconstitutional. This new provision fails to provide requisite fixed constitutional due process standards that are essential to adequately protect mentally ill persons in treatment settings, in the administration of proposed psychotropic medication, such as we find in this case at bar involving respondent/petitioner C.E. who is refusing the medication.

Aside from the grave consequences that may result from psychotropic medication and the fact that patients may be stabilized for a period of time that may be temporarily beneficial to the patient, we cannot lose sight of the constitutionally protected fundamental rights that are being violated, when a legally competent individual refuses medication, and is being unwillingly subjected to highly

intrusive treatment, which violates his Rights of Privacy, Due Process, Equal Protection of the Laws, Freedom of Speech and in some other instances Freedom of Religion.

It is this court's opinion that protective, mandated, fixed standards must be contained in 2-107.1 which it lacks, in order to permit the use of substituted judgment by a surrogate on behalf of a patient who does not have the legal capacity to make an informed decision. Also, fixed standards ought not permit forced medication on a patient who has not been found legally incompetent to make informed decision regarding proposed psychotropic medication, as in this case at bar.

Due process of the law requires that judges, jurors and other decision-makers resolve disputes based on legally fixed standards in determining what is or is not prohibited in each particular case. *Clerk v. Weeks*, 414 F. Supp. 703 (N.D. Ill. 1976). We find that Section 2-107.1 is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors unreined latitude to decide, without use of legally sufficient fixed standards. Therefore, it must fail under the 14th Amendment Due Process, Equal Protection of the Laws and Rights of Privacy which protects an individual against unwanted invasion of his mind and body. *People v. Mostert*, 34 Ill. App. 3d 767, 340 N.E.2d 300 (1976). A statute is unconstitutionally vague where its terms are so ill-defined that the ultimate decision as to its meaning rests on opinions and whims of the trier of facts rather than any objective criteria or facts. *People v. Pembrock*, 62 Ill. 2d 317, 342 N.E.2d 28 (1976).

We find that 2-107.1 allows overly-broad discretion, to judges and counsel, on whether or not a guardian and a guardian ad litem for the respondent is required to adequately protect the respondent against invasion of his con-

stitutionally guaranteed rights in competency and treatment hearings and in treatment authorized by the court without legally adequate input about the respondent's medical, physical and psychiatric history from a guardian and guardian ad litem could provide.

We find that given the grave invasion and intrusion into an individuals mind and body—as is being proposed in this instant case—that Section 2-107.1 should be subjected to the constitutional "strict scrutiny" test, and not the "rational basis" test which Intervenor argues is appropriate, to determine whether this statute meets constitutional Due Process standards.

It is the opinion of this court that the statutory grant of discretion and authority to virtually anyone who is 18 years of age or older—by Section 2-107.1—to petition the court for an order for the administration of psychotropic medication to a person who lacks legal capacity to consent or refuse such treatment, without a concomitant fixed provision in the Act mandating court appointment of a guardian and guardian ad litem fails to meet constitutional due process protections. We find that this protection for the patient is essential in all circumstances that involve the use of psychotropic medication, all of which are highly invasive and formulated to alter the mind, mood and body, with often times serious side effects and with the potential to cause irreversible harmful consequences.

We agree with petitioner, that if Section 2-107.1 were to be found constitutional, that it renders the existing guardianship provisions of the Probate Act (that have been used in conjunction with the Mental Health Code for purposes of medication of mentally ill persons) no longer available to help chronic schizophrenics in the continuum of an extended treatment course, since 2-107.1 purports, if constitutional, to substitute this new provision

as the sole new method of treatment intervention. Counsels for C.E. and L.E. assert this is too cumbersome if valid. Under the Probate Act, which 2-107.1 supplants, the guardian had inherent authority to exercise his/her judgment in giving or denying consent for the proposed medication. Now, Section 2-107.1(g) provides that a guardian shall be authorized only to consent to the administration of psychotropic medication under the standard and procedures of this section. (Underlining supplied). Under the Probate Act, the following due process steps were taken in medication matters: a) petition would be filed, b) Statement of petitioner/respondent relationship obtained, c) Name, date of birth and residence of petitioner, d) Reasons given for guardianship, e) Names of respondent's nearest relatives obtained, f) Name and address of current guardian, if any appointed. These due process measures were taken to safeguard respondent's rights and to have his wishes with respect to unwanted or desired medication carried out. Following this process, the Mental Health Court then takes the following actions; a) Appoints a temporary guardian, if none appointed in Probate Court; b) A guardian ad litem is appointed to investigate the pertinent background of the patient's physical, medical and psychiatric history and to report the findings to the court, in order to assist the court to determine the benefits and risks of the proposed treatment and to ascertain, on basis of substituted judgment, whether or not to have the respondent medicated or not medicated, depending upon his legal competency or lack of legal competency to give or deny informed consent.

Since all persons have a fundamental right to refuse medical treatment, recognition of that right must extend to the incompetent individual, as well as to the competent individual, because the value of human dignity guar-

anteed under the constitutions extends to both. *Rogers*, 458 N.E. 2d at 315. A distinct adjudication of incapacity to make treatment decisions must precede any determination to override a person's right to make their own treatment decisions. *Rogers*, 458 N.E. 2d at 314. Once an individual is found incompetent, the individual is not capable to make an informed and voluntary choice to exercise his right to accept or refuse. His right must then be exercised by a surrogate decision-maker. *Cruzan*, 110 S.Ct. at 2852. The surrogate or guardian is required to exercise the incompetent's rights by using the substituted judgment standard. *Greenspan*, 137 Ill. 2d 1.

We disagree with Intervenor's conclusory argument that adjudication of incompetence under Section 2-107.1 actually affords more rights to the individual than such an adjudication under the present Probate Act. Ill. Rev. Stat. ch. 110½, par. 11a-3 (1991).

Even though the individual may have been found in need of a guardian by a standard of preponderance of evidence in the Probate Court hearing, under procedures prior to 2-107.1, the Mental Health Court would make its medication determination on the basis of clear and convincing standard of evidence.

We disagree with Intervenor's conclusions purportedly based on the Governor's Commission report that the guardianship system, including the State's Guardianship and Advocacy Commission, created by the Governor and Legislature, "seems ill-suited to the task because it may result in a substantial deprivation of the rights of the patient with few procedural protections, yet does not accomplish the task for imposing treatment, when needed, in a speedy and efficient manner." It seems to this court that passage of 2-107.1 was an attempt made in the interest of "speedy

and efficient process", with a substantial sacrifice of due process protection for respondents and that it was enacted for administrative convenience and not clinical purposes.

CONSTITUTIONAL LAW PRINCIPLES

We are mindful of the fundamental rule that there is a presumption in favor of the constitutionality of a legislative enactment. *Chicago v. Ames*, 365 Ill. 529, 7 N.E.2d 294 (1937). The courts must start out with the presumption that a statute is constitutional and valid, *Miamisburg v. Clayment*, 37 N.E.2d 94 (Ohio Ct. App. 1941), and that every act of the legislature is presumed to be in harmony with the constitution unless the contrary *clearly* appears, *McAneny v. Board of Estimate & Apportionment*, 232 N.Y. Ct. App. 377, 134 N.E. 187 (1922), by being patently unconstitutional on its face, *Klemm & Sons v. Winter Haven*, 141 Fla. 60, 192 So. 652 (1939).

Moreover, case law supports the principle that the presumption of constitutionality of legislation is a strong one, *United States v. DiRe*, 332 U.S. 581 (1948), but it is not conclusive, *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194 (1934), because the presumption may be overcome by a showing that the statute operates to deprive one of property without due process of law or that any of the guarantees of the constitution have been violated, *Paley v. Bank of America National Trust and Savings Association*, 159 Cal. App. 2d 500, 324 P.2d 35 (1958).

Due process of law and equal protection of the laws exist when the laws affect alike all persons similarly situated, *State ex rel. Civello v. New Orleans*, 154 La. 271, 97 So. 44 (1923), and due process of law as used in the constitution has been construed as protecting substantive as well as procedural rights, *Allbritton v. Winona*, 181 Miss. 75, 178 So. 799 (1938).

In determining what is or what is not due process as it affects the ordinary rights of citizens, the court generally looks to see whether the legislation which affects or trammels those rights is reasonably related to and designed to protect health, safety, moral, or public welfare of the people or any portion of them. *State of Utah v. Mason*, 78 P.2d 920 (Utah 1938).

However, the ultimate determination of the constitutionality of any act of the legislature rests with the courts, notwithstanding the presumption in favor of the constitutionality of such acts. *State ex rel. Troy v. Yelle*, 27 Wash. 2d 99, 176 P.2d 459 (1947).

IT IS THEREFORE
ADJUDGED, DECREED AND ORDERED THAT:

Section 2-107.1 of the Mental Health Code is Unconstitutional on its face, violating the Due Process Cause of the U.S. Constitution, as well as similar provisions of the constitution of the State of Illinois. It is Unconstitutional because it deprives the individual of his right of self-determination—the right exercised by himself if he is presumed competent, or exercised through his duly authorized surrogate if incompetent—to refuse unwanted psychotropic medications or to accept psychotropic medication.

We agree with counsel for the guardian that the concept of the Right of Privacy, supported by Article I, Section 12 of the Illinois Constitution, is also applicable to protect respondent C.E. from the intrusion of unwanted psychotropic medication by his refusal when competent, or by refusal through the appointed surrogate on his behalf, if he is incompetent to give his own informed consent or refusal.

Section 2-107.1, Ill. Rev. Stat. ch. 91½, par. 2-107.1 (1991), of the Mental Health Code is unconstitutional in that it violates Illinois State's and Federal Constitutional guarantees of the Due Process, Privacy Rights, Equal Protection of the Laws and Freedom of Religion.

We therefore declare Section 2-107.1 of the Illinois Mental Health Code to be null and void. It is hereby stricken.

Date: _____

Enter: _____

Judge Marjan Staniec
March 30, 1992
Circuit Court 433

APPENDIX C

[Letterhead Of]

Illinois Supreme Court
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Illinois 62706
(217) 782-2035

October 3, 1994

Mr. William E. Coffin
Legal Advocacy Service
160 North LaSalle, Suite S-500
Chicago, Illinois 60601

No. 73605—In the Matter of C.E., etc., et al., appellees, v. Illinois Department of Mental Health and Developmental Disabilities, appellant. Appeal, Circuit Court (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on October 13, 1994.

(3)

FILED
APR 21 1995
OFFICE OF THE CLERK

No. 94-1164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

C.E. and L.E.,

Petitioners,

v.

ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

JAMES E. RYAN
Attorney General of Illinois

BARBARA A. PREINER
Solicitor General of Illinois

RITA M. NOVAK
Counsel of Record
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5659

Attorneys for Respondent

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction under 28 U.S.C. § 1257(a), conferring jurisdiction over final judgments of the highest state court in which review could be had, where the judgment of the Supreme Court of Illinois anticipates further proceedings below that may affect the nature of the constitutional questions presented?

2. Does the State violate the due process rights of a recipient of mental health services when it establishes a statutory scheme providing for judicial authorization of the involuntary administration of psychotropic medication, if specified criteria are established by clear and convincing evidence?

3. Is the equal protection clause even implicated where a uniform statutory scheme governs procedures that must be followed in all instances before a recipient of services must submit to the involuntary administration of psychotropic medication?

LIST OF PARTIES

Petitioner C.E., an adult male, is a recipient of mental health services. He is the subject of petitions filed by his father, L.E., also a petitioner herein, which *inter alia* sought an appointment as C.E.'s plenary guardian and an order authorizing the administration of psychotropic medication to C.E. L.E. had previously served as C.E.'s temporary guardian by an appointment under the Illinois Probate Act of 1975.

The Respondent Illinois Department of Mental Health and Developmental Disabilities is the State agency charged with administering the Mental Health and Developmental Disabilities Code. 405 ILCS 5/2-100 *et seq.* (West 1992). The Department intervened in the Circuit Court of Cook County to defend the constitutionality of section 2-107.1 of the Code. 405 ILCS 5/2-107.1 (West 1992).

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No. 94-1164

IN THE

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ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The Supreme Court of Illinois entered its judgment on May 19, 1994. (App. A-1) C.E. timely filed a petition for rehearing, which the court denied on October 3, 1994. (App. C-1) The Petition was filed in this Court on December 30, 1994. The Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). Respondent maintains, however, that there is no final judgment as required to confer jurisdiction under that provision.

STATEMENT OF THE CASE

The Challenged Provision

a. History of Section 2-107.1

In 1989, then-Governor Thompson appointed a Commission to Revise the Mental Health and Developmental Disabilities ("MHDD") Code. The Governor charged the Commission, comprised of experts in the mental health field, with the task of suggesting changes to the MHDD Code and related laws with respect to certain issues, including the right to refuse treatment and informed consent. The Commission proposed, among other things, that legislative standards be established for the involuntary administration of psychotropic medications to mentally ill or developmentally disabled recipients of services who lack the capacity to make reasoned decisions about such medications. (R. C61-62, 64-65)

The Commission found serious flaws in the then-existing system. (R. C61) With respect to the emergency medication provisions of section 2-107, 405 ILCS 5/2-107 (West 1992), the Commission noted that the lack of specificity in that section allowed hospitals to impose medication involuntarily in situations that were not true emergencies. (R. C61) It also noted that the lack of specificity led some facilities to decline to medicate patients, even where warranted, for fear of liability. (R. C61)

The Commission further found that "there are circumstances under which medication should be imposed that cannot be characterized as emergencies." (R. C64) The Commission observed:

> Perhaps most significant was the evidence received by the Commission that many patients who need and would benefit from treatment are not receiving that treatment because, due to their illness, they do not

> recognize their need for medication and are unable to make a reasoned decision concerning this important matter.

(R. C62)

Finally, the Commission found serious shortcomings in the guardianship procedures then being used to secure the involuntary administration of medication in non-emergency situations. For example, the Commission noted that many disabled adults did not have guardians appointed and did not have a close relative or friend who could serve in that capacity. The Office of the State Guardian, moreover, did not have the resources to assume responsibility for an entirely new group of clients. (R. C62)

More fundamentally, the Commission viewed the guardianship system to be "ill suited to the task" of addressing the more limited area of treatment and medication decisions. (R. C62) Many mental health patients are not "incompetent," in the sense of lacking decision-making capacity for all purposes and for extended periods of time. Some patients lack the capacity only to make some decisions, and some are incapable of making decisions only for short periods of time. Yet, under the guardianship system, the guardian is given plenary authority over matters concerning the ward, and sometimes the guardianship is not terminated even when the patient improves. Appointing a guardian for these persons, even assuming an appointment would be permissible, substantially reduces their autonomy. (R. C62)

Additionally, the Commission found that the guardianship procedures often did not accord the patient sufficient protection, because he was usually not present and not represented by counsel. Even in emergency circumstances, it usually took one month from the time of filing the peti-

tion to the appointment. (R. C62) The Commission recommended amendments to the MHDD Code to address the flaws in the system pertaining to the administration of psychotropic medication.

b. The Framework of Section 2-107.1

The Illinois legislature responded by enacting 2-107.1. Under section 2-107.1, psychotropic medication may only be administered to a "recipient of services" against his will under the standards and procedures specified therein. *See* 405 ILCS 5/2-107.1 (West 1992). A "recipient of services" includes both mentally ill and developmentally disabled persons. *See* 405 ILCS 5/1-111, 5/1-123, 5/1-128 (West 1992). Moreover, the standards and procedures outlined in that section must be followed, regardless of whether or not a guardian has been appointed. P.A. 89-11, § 5, *amending,* 405 ILCS 5/2-107.1(g). (Resp. App. A-2)*

The non-emergency, involuntary administration of psychotropic medication may be accomplished only by an order of the court after a showing, by clear and convincing evidence, that six criteria are met:

> (1) That the recipient has a serious mental illness or developmental disability.
>
> (2) That because of said mental illness or developmental disability, the recipient exhibits deterioration of his ability to function, suffering, or threatening or disruptive behavior.
>
> (3) That the illness or disability has existed for a period marked by the continuing presence of the

---

* Section 2-107.1 was amended effective March 31, 1995. *See* p. 6 *infra.* A copy of the amended statute is reprinted in the appendix to this Brief. To avoid confusion, citation is made to the codified statute, unless the reference is to a substantive change.

> symptoms set forth in paragraph (2) of subsection (d) of this Section or the repeated episodic occurrence of these symptoms.
>
> (4) That the benefits of the psychotropic medication will outweigh the harm.
>
> (5) That the recipient lacks the capacity to make a reasoned decision about the medication.
>
> (6) That other less restrictive services have been explored and found inappropriate.

405 ILCS 5/2-107.1(d).

If all of these factors are established by the requisite evidence, a court may order the administration of psychotropic medication. The order must designate the persons authorized to administer the psychotropic medication, 405 ILCS 5/2-107.1(f), and it may "in no event" be effective for more than 90 days. 405 ILCS 5/2-107.1(e). A court may order medication for additional 90-day periods, but only pursuant to subsequent hearings that comply with the standards and procedures of section 2-107.1 *Id.*

The proceedings are initiated by filing a petition, which must be filed with the circuit court by someone at least 18 years of age. It may be filed by a guardian. 405 ILCS 5/2-107.1(a). A guardian may not, however, consent to the administration of psychotropic medication over the objection of the ward other than under the standards and procedures of section 2-107.1. P.A. 89-11, § 5, *amending*, 405 ILCS 5/2-107.1. (Resp. App. A-2) A hearing on the petition must be held within 30 days. 405 ILCS 5/2-107.1(b).

The six factors in section 2-107.1 were recommended by the Governor's Commission to be used to determine whether to provide services in the absence of consent. The section also provides certain safeguards not found in the Commission's recommendations: (1) it limits section 2-107.1 to psychotropic medications; (2) it requires application of

a clear and convincing burden of proof; (3) it ensures against the application of conflicting standards under the Probate Act by making it the exclusive means for obtaining orders for the involuntary administration of psychotropic medications; and (4) it provides rigorous procedural protections by incorporating those contained in chapter 3, article VIII of the MHDD Code. *See* 405 ILCS 5/2-107.1.

On March 31, 1995, the General Assembly amended section 2-107.1. The amendment clarifies that a guardian may consent to the administration of psychotropic medication to a non-objecting recipient, P.A. 89-11, § 5 (Resp. App. A-3), and that a guardian may only consent to the administration of such medication "to an objecting recipient" if the standards and procedures of section 2-107.1 are followed. P.A. 89-11, § 5. (Resp. App. A-2) The amendment also renumbers some of the subsections of the Act.*

---

* Currently, another amendment to the statute is pending in the Illinois General Assembly. Senate Bill No. 1048. This amendment would revise various provisions of the MHDD Code concerning the administration of psychotropic medications, including section 2-107.1.

The amendment limits the circumstances and duration of the administration of such medications in emergency situations. It adds a provision to section 2-107.1, requiring notification of the hearing to the respondent and the guardian and provides for court approval of certain tests before medication is administered. The amendment shortens the time from 30 to 14 days from filing the petition to hearing. It requires the court to determine that testing is essential for the safe administration of the medication, when such testing is requested. Under the amendment, medication may continue after 90 days, if a new petition is filed 15 days before the order is to expire and the recipient agrees to a continuance of the hearing. Finally, the person designated by the court order to administer the medication "shall have complete discretion not to administer any medication authorized under this Section." S.B. 1048, § 5, which would amend 405 ILCS 5/2-107(f).

In enacting section 2-107.1, the General Assembly determined that the decision whether to involuntarily administer psychotropic medication to mentally ill or developmentally disabled individuals who lack the capacity to make reasoned decisions concerning such medication should be made by a court pursuant to a clear and convincing standard of proof, rather than by a guardian or family member. In so doing, the General Assembly elected to place the risk of an erroneous determination on the party seeking the order to medicate, rather than on the individual refusing the medication. The General Assembly also determined that such medication may only be ordered for 90 days at a time. This requirement ensures that monitoring will occur to avoid the serious side effects which typically do not occur unless such medication is utilized continuously or regularly for extended periods of time. Thus, section 2-107.1 reflects both the General Assembly's recognition of the well-documented therapeutic benefits of psychotropic medications, and its sensitivity to the potentially serious side effects of such medications.

The Opinion of the Illinois Supreme Court

In this facial challenge, the Petitioners acknowledge that the Illinois Supreme Court found that section 2-107.1 "permits the court's consideration of the substituted judgment standard" (App. A-19), and that the patient's "wishes, when competent, will often by [sic] very relevant to a determination of whether psychotropic substances should be administered." (App. A-21) (Petition at 10) The court also made clear its expectation that, in section 2-107.1 proceedings, the circuit court must give consideration to the " 'substituted judgment' of the mental health recipient" (App. A-19) and that the court must "respect the wishes expressed by the mental health patient when the patient was capable of making rational treatment decisions." (*Id.*)

At the same time, the court recognized that, as the statute is applied in myriad contexts to mentally ill or developmentally disabled persons, circumstances may arise when the substituted judgment standard " 'converts into a legal fiction' " because ascertaining the wishes of such persons is simply impossible. (App. A-19 (quoting Chicon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 La. L. Rev. 283, 392 (1992).) In those instances, when the patient's "wishes have not been clearly proven, . . . the court should be guided by an objective standard of reasonableness, as shown by the evidence presented." (App. A-19; *see also* App. A-21) The court considered this "hybrid" standard (App. A-20) most suitable to "preserve the integrity of the mental health patient while respecting the health care professional's duty to treat the patient." (App. A-19)

With respect to the equal protection analysis, the court's pronouncement that the court may appoint a guardian or a guardian *ad litem* in section 2-107.1 proceedings constitutes only a portion of the court's decision on that claim. (Petition at 10-11) The court also concluded that even the limited or temporary guardian must comply with section 2-107.1's requirements. (App. A-31)

Because the court was faced with a facial challenge to section 2-107.1, and because the circuit court had not ruled on L.E.'s petition or applied the statute's factors to C.E.'s circumstances, it remanded the case for further proceedings.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION UNDER SECTION 1257(a) BECAUSE THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS IS NOT FINAL.

Finality as a condition precedent to review is an historic characteristic of the Court's jurisdiction over state litigation. *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62, 67 (1948) (noting that Congress has limited the Court's power to review final judgments of the highest state court in which review could be had since 1789). The finality rule guards against unnecessary expense, delay and labor occasioned by successive appeals in the same case. *Id.*; *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 124 (1945). As importantly, strict compliance with this rule avoids premature and inappropriate adjudications of constitutional issues. *Minnick v. California Department of Corrections,* 452 U.S. 105, 122 (1981). And in the context of review of state court judgments, the finality requirement is nothing less than "an important factor in the smooth working of our federal system," *Radio Station WOW,* 326 U.S. at 124, since the Court's jurisdiction is invoked "in the realm of potential conflict between the courts of two different governments." *Id.* Thus, the party seeking review "has the burden of affirmatively establishing this Court's jurisdiction," *Republic Natural Gas,* 334 U.S. at 70-71, with any doubts resolved against its exercise. *Id.*

Ordinarily, a judgment is not considered final until the rights of the parties are fully determined and there is nothing left to do except enter judgment. *See Gospel Army v. City of Los Angeles,* 331 U.S. 543, 546 (1947). Therefore, in most circumstances, the final judgment rule precludes review " 'where anything further remains to be

determined by a State court, no matter how dissociated from the only federal issue that has been finally adjudicated by the highest court of the State.' " *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (quoting *Radio Station WOW*, 326 U.S. at 124).

In this case, L.E. filed a petition for the involuntary administration of psychotropic medication under section 2-107.1, as well as a petition for declaratory judgment holding that provision unconstitutional. Since the circuit court invalidated the statute, it did not rule on L.E.'s petition or determine whether C.E. must submit to the administration of psychotropic medications. Those issues must be resolved on remand. Thus, the rights of the parties were not finally determined by the judgment, and the fact that the Illinois Supreme Court resolved some federal questions does not render its decision final for purposes of this Court's jurisdiction. *See Flynt*, 451 U.S. at 620-21; *Republic Natural Gas Co.*, 334 U.S. at 69-70.

While the Court has interpreted the finality requirement flexibly, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-85 (1975), this case does not fall squarely within the two exceptions upon which Petitioners rely. (Petition at 11-12) Contrary to Petitioners' suggestion, federal question may still arise on remand. The Illinois Supreme Court's interpretation of section 2-107.1 presupposes that where evidence is available, the trial court must consider the preferences of the individual who is the subject of a petition under that section. (App. A-19–A-21) It thus incorporates, in appropriate cases, the constitutional standard urged by Petitioners. *See In re Jeffers*, 239 Ill. App. 3d 29, 606 N.E.2d 727, 730-31 (1992) (holding substituted judgment standard not required or applicable under section 2-107.1), *petition for leave to appeal allowed*, 158 Ill. 2d 570, 643 N.E.2d 839 (1994) (ordering reconsideration of

judgment in light of *In re C.E.*), *reaffirming decision on remand*, No. 4-93-0566 (Ill. App. Ct., order filed Apr. 6, 1995) (noting that supreme court's decision requires consideration of substituted judgment standard but finding no evidence showing what recipient's wishes were). Although the court resolved certain constitutional questions, further proceedings may give rise to others. In any event, because of the State court's interpretation of the statute, state law and constitutional questions are not neatly segregated. *See Minnick*, 452 U.S. at 122-26.

In *Flynt*, 451 U.S. at 621, the Court explained that "in most, if not all, of the cases" falling within *Cox*'s categories, "not only was there a final judgment on the federal issue for purposes of state-court proceedings, but also there were no other issues to be resolved." Therefore, there was no likelihood of piecemeal review of the federal questions. Here, as in *Flynt*, where additional proceedings are contemplated that may give rise to, if not entirely new at least different, federal questions, review at this time provides no assurance that the litigation will not generate another appeal.

Moreover, Petitioners' unsupported assertion that the federal question will escape review at a later time is neither correct nor determinative of whether finality exists in this case. (Petition at 11-12) If the trial court wholly ignores C.E.'s wishes while competent, or concludes that no evidence shows what those wishes are, C.E. may still raise a federal question regarding the constitutionality of such a ruling on appeal. *See Jones v. Petrolane-Cigras, Inc.*, 186 Ill. App. 3d 1030, 542 N.E.2d 1186, 1188 (1989), *appeal denied*, 128 Ill. 2d 663, 548 N.E.2d 1069 (1989) (law of case on remand does not encompass issues not decided by reviewing court). The Illinois Supreme Court would be obliged to consider a challenge to the constitutional-

ity of the statute as applied on direct appeal, just as it was obliged to entertain on direct appeal the facial attack below. *See* Ill. Sup. Ct. R. 302(a); *see Catlett v. Novak*, 116 Ill. 2d 63, 506 N.E.2d 586, 587-89 (1987) (entertaining appeal from finding of unconstitutionality as applied under Rule 302(a)). Alternatively, even if direct review were not available, Petitioners could seek review in the Illinois Appellate Court and, after exhausting further appeals, could then again ask this Court to review the entire case. *See, e.g., Hathorn v. Lovorn*, 457 U.S. 255, 261-62 (1982) (rejecting contention that law of case bars review of federal question after initial denial of certiorari since contrary interpretation would insulate interlocutory state court constitutional rulings from review). Thus, Petitioners have not shown that theirs falls in the category of cases where unique circumstances would prevent review at a later time. *E.g. North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163 (1973) (state law prevents appeal by administrative agency of its own decision).

Accepting Petitioner's interpretation of *Cox*'s fourth exception, which would permit immediate review whenever a party could prevail on the merits on remand on state law grounds and make review of the federal question unnecessary, as in *Flynt*, would permit the exception "to swallow the rule." *Flynt*, 451 U.S. at 622. On remand, were the evidence to show that C.E. would have categorically refused such treatment when competent, perhaps the trial court would deny the request for involuntary administration of the medication. In that event, C.E.'s right of refusal, as well as this Court's preference to avoid constitutional adjudication, would be preserved. *See Minnick*, 452 U.S. at 122; *see also Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 382 (1953) (citing possibility that later

proceedings will dispose of need for appeal as a rationale for finality rule).

Here, because federal questions are likely to arise during the course of further proceedings and a later appeal is available, "[t]he resolution of [the federal] question can await final judgment without any adverse effect upon important federal interests." *Flynt*, 451 U.S. at 622. Rejecting Petitioners' claim to jurisdiction here, when the development of facts will necessarily clarify and illuminate the constitutional interests at stake, is all the more justified. *See Minnick*, 452 U.S. at 122-23.

II.

EVEN IF THE JUDGMENT WERE FINAL UNDER SECTION 1257(a), REVIEW AT THIS TIME WOULD BE IMPROVIDENT BECAUSE THE RECORD, WHICH WILL BE DEVELOPED ON REMAND, DOES NOT CONTAIN FACTS CRITICAL FOR RESOLVING THE ISSUES.

The very factors that preclude jurisdiction—the intermingling of federal and state law questions and the lack of a factual record—also render inappropriate the exercise of this Court's discretion to allow review at this time. It has long been the policy of this Court to avoid "anticipat[ing] a question of constitutional law in advance of the necessity of deciding it." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., dissenting in part) (internal quotations omitted). This policy entails both constitutional and prudential limitations upon the exercise of federal court jurisdiction. *Rescue Army v. Municipal Court of the City of Los Angeles*, 331 U.S. 549, 568-74 (1947). It is founded in concern that this Court has no power to issue advisory opinions, *Ashwander*, 297 U.S. at 345-46, and so the Court has insisted on "strict necessity in disposing of constitutional issues." *Rescue Army*, 331 U.S. at 568.

In this case, Petitioners seek a ruling that an individual's liberty interest *always* precludes the State from exercising its *parens patriae* powers to be able to administer psychotropic medication in non-emergency situations, regardless of the requirement of a court order, or of how the medication will benefit the recipient, or of what other treatment alternatives exist, except when, using the substituted judgment standard, evidence would show that the recipient would have consented to the treatment. Subsumed in this question are subsidiary issues, such as whether the individual's interest to refuse treatment must be deemed fundamental, what significance is to be given to the State's interest, and can the State's interest ever be found to outweigh the individual's interests. Petitioners ask this Court to resolve these weighty and intricate questions, moreover, in the context of a facial challenge to section 2-107.1. The total absence of facts in this record, the complexity of the issues, and the expectation that proceedings on remand may illuminate at least some of the factors to be considered make review at this time manifestly inappropriate.

In passing on the issues, this Court, as the Illinois court did, will have to take into account the various types of mental impairments and disabilities that might afflict the subjects of the petition under section 2-107.1 in setting a constitutional standard. Some of these persons, the severely mentally retarded for example, may never have had the capacity to reach a decision about their treatment. Others may have experienced long intervals of time in which they were fully capable of making rational treatment choices. The record contains no information about any of these groups or the differences between them.

Moreover, no facts were developed below concerning the nature or duration of the medications to be prescribed.

Importantly, while the Petition catalogues the dangers of psychotropic medication (Petition at 4-6), which the Illinois Supreme Court itself acknowledged (App. A-11–A-12), L.E., presumably acting in C.E.'s best interests, sought first as his temporary guardian and then in a section 2-107.1 petition to obtain such treatment for his son. (R. C2) Obviously, then, psychotropic medications also have curative and beneficial effects. *See* Brakel and Davis, *Taking Harms Seriously: Involving Mental Patients and the Right to Refuse Treatment*, 25 Ind. L. Rev. 429, 437 (1991). The resolution of factual matters pertaining to the type of medications, the duration of administering them, their salutary effects, and the effects on the recipient of not taking such medications would be critical in fully exploring all of the factors relevant to the due process questions presented.

The record in this case does not even reveal facts about C.E.'s history. Because the circuit court held the statute invalid on its face, the court did not consider evidence of C.E.'s wishes while competent, or even whether such evidence was available. These matters are likely to be explored on remand, since the Illinois Supreme Court required the circuit court to consider such evidence, if available, in passing upon section 2-107.1 petitions. (App. A-19–A-22) The Court would then have a factual context in which to examine the important and delicate constitutional concerns at issue. *See Gospel Army*, 331 U.S. at 548 ("[E]xperience demonstrates that particularly in constitutional cases issues turn upon factual presentation.")

In this regard, it is significant that in this facial challenge, no evidence has yet been presented on the specific type of medication that C.E. would be prescribed. Nor were there facts presented showing the benefits or risks

to C.E. if the medication is administered or withheld. No evidence helped the court assess whether other treatment had been "explored and found inappropriate." 405 ILCS 5/2-107.1(a)(6). A showing was not made as to how long C.E. would have taken, or would be required to take, the medication, or how effective the medication would be.

Evidence of this nature would be useful to the Court in weighing and evaluating whether, or in what circumstances, a substituted judgment standard would be constitutionally required. The context of the proceedings below—a declaratory judgment—accorded no opportunity for developing such a factual record, *see Rescue Army*, 331 U.S. at 574 (cautioning that "the greatest care" is required in the declaratory judgment setting to prevent premature constitutional adjudication), and the nature of a facial challenge necessarily required the court below, as it would this Court, to test the statute against myriad, hypothetical situations. (*See* App. A-8 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987), for the standard that the law must be upheld unless "no set of circumstances exists under which [it] would be valid."))

Since the questions to be resolved on remand mesh with the constitutional standard Petitioners seek, and since development of the facts will clarify and define the constitutional questions, review at this time is premature, even if the judgment is final. Therefore, on this basis alone, the Court should deny the petition.

III.

THE ILLINOIS SUPREME COURT CORRECTLY DETERMINED, IN THIS FACIAL CHALLENGE, THAT SECTION 2-107.1 DID NOT VIOLATE C.E.'S RIGHT TO DUE PROCESS, AND ITS DECISION IS PERFECTLY CONSISTENT WITH THIS COURT'S RULINGS.

The Illinois Supreme Court recognized, consistent with this Court's decisions, that "persons who are mentally ill or developmentally disabled have a Federal constitutionally protected liberty interest to refuse the administration of psychotropic drugs." (App. A-11) *See, e.g., Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 279 (1990); *Washington v. Harper*, 494 U.S. 210, 221 (1990); *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982). It also determined, consistent with a number of federal and state court decisions, that "the state has a legitimate *parens patriae* interest in furthering the treatment of those who are mentally ill by forcibly administering psychotropic medication when the patient is not capable of making a sound decision in his own behalf." (App. A-14; *see also* App. A-14–A-15 and cases cited therein.) Consequently, in accordance with this Court's approach in *Cruzan*, *Washington* and *Youngberg*, the Illinois court found it "necessary to balance 'the liberty of the individual' and 'the demands of an organized society.' " (App. A-15 (quoting *Youngberg*, 457 U.S. at 320) (internal quotations omitted)); *Cruzan*, 497 U.S. at 279; *Washington*, 494 U.S. at 220.

In deciding where that balance was to be struck in the context of this facial challenge, the supreme court found specific features of section 2-107.1 particularly significant in reaching the conclusion that that provision did not, "on its face, impermissibly burden the Federal constitutional liberty interests of C.E." (App. A-17) First, section 2-107.1 was "narrowly tailored to specifically address the State's

concern for the well-being of those who are not able to make a rational choice regarding the administration of psychotropic medications." (App. A-15) It set forth precise standards that had to be established by clear and convincing evidence, identified the clinical disabilities that had to exist and provided a mechanism for when the medications could be administered against the will of the patient. (App. A-16)

Second, the statute permitted the involuntary administration of psychotropic medications in limited circumstances. The recipient had to be suffering from specified conditions, a " 'deterioration of his ability to function, suffering, or threatening or disruptive behavior.' " (App. A-16 (quoting 405 ILCS 5/2-107.1(d)(2)).) The conditions had to have been manifested for a defined period of time. (App. A-16 (citing 405 ILCS 5/1-107.1(d)(3)).) These medications could only be authorized if their benefits outweighed the harms and less restrictive services had been considered and found ineffective. (App. A-16 (citing 405 ILCS 5/2-107.1(d)(4), (d)(6)).)

Third, section 2-107.1 required a hearing before a trial judge. The court's intervention would ensure that the medication would be used for "therapeutic" rather than disciplinary or management purposes. (App. A-16) Further, the 90-day limitation on the treatment (405 ILCS 5/2-107.1(e)) "not only ensures that only those persons who actually lack the capacity to make reasoned decisions concerning psychotropic medication will have that decision made for them by the court as surrogate, it also ensures that persons who actually lack the capacity to make reasoned decisions concerning psychotropic medication will only be given such medication for the period of time it is most needed." (App. A-16–A-17)

In addition to these features of the statute, the supreme court also specifically responded to C.E.'s contention that the due process clause required a substituted judgment standard. (App. A-17–A-22) The court found that the recipient's wishes while competent "will often by [sic] very relevant to a determination of whether psychotropic substances should be administered under section 2-107.1." (App. A-21) However, the court also recognized that such evidence will sometimes not be available and that, in those instances, "an objective standard of reasonableness" would be sufficient. (App. A-19) By adopting this hybrid standard, "the court may preserve the integrity of the mental health patient while respecting the mental health professional's duty to treat the patient." (App. A-19)

Contrary to Petitioners' argument, this decision does not conflict with the decisions of this Court. In fact, Petitioners overstate the scope of this Court's rulings in *Cruzan* and *O'Connor v. Donaldson*, 422 U.S. 563 (1975), in asserting a claim of conflict.

Most recently, in *Cruzan*, this Court expressly cautioned that "in deciding 'a question of such magnitude and importance . . . it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject.' " *Cruzan*, 497 U.S. at 277-78 (quoting *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897)). Consistent with this view, the Court held that Missouri could insist on a substituted judgment standard established by clear and convincing evidence before permitting a surrogate to withdraw hydration and nutrition for a person in a persistent vegetative state without offending the due process clause. 497 U.S. at 284. The Court made clear, however, that the issue before it was "simply and starkly whether the United States Constitution *prohibits* Missouri from choosing the rule of decision which

it did." *Id.* at 277 (emphasis added). It did not even purport to decide that such a standard was constitutionally *required.*

The Court nonetheless did not equate the rights of an incompetent person to refuse treatment with those of a competent person. Rather, it noted that such an argument "in a sense begs the question," *id.* at 280, because an incompetent person is unable to make such decisions. *Id.*

O'Connor likewise provides no support for Petitioners' claim of conflict. In that case, the Court merely decided that the due process clause prohibits a state from confining a non-dangerous mentally ill patient against his will for indefinite periods. 422 U.S. at 575. The Court expressly refused to resolve the issue whether the state may compulsorily confine such a person for purposes of treatment. *Id.* at 573.

Petitioners also paint with a broad brush in asserting that the decision below conflicts with the standard articulated by the Supreme Judicial Court of Massachusetts in *In the Matter of Guardianship of Roe,* 383 Mass. 415, 421 N.E.2d 40 (1981). While that court required the application of the substituted judgment standard before the involuntary administration of psychotropic medication, the procedures and factors to consider that the court cited in applying that standard are akin to those in section 2-107.1. For example, the court refused to allow the guardian to consent on behalf of the ward and designated the court as the decision-maker, just as section 2-107.1 does. *Id.* at 434, 421 N.E.2d at 51; 405 ILCS 5/2-107.1(a).

Further, in identifying the factors relevant to application of the substituted judgment standard, the court articulated a non-exclusive list, including the ward's expressed preferences regarding treatment, his religious beliefs, the

impact upon his family, the probability of adverse side effects, the consequences if treatment is refused, and the prognosis with treatment. 383 Mass. at 444, 421 N.E.2d at 57. Many of these factors correspond to the standards set by section 2-107.1, as interpreted by the Illinois Supreme Court. (App. A-19 (finding evidence of the recipient's wishes while competent relevant)); 405 ILCS 5/2-107.1(d)(2)-(4), (d)(6) (requiring a showing of deterioration of ability to function or threatening or disruptive behavior, sustained or repeated episodes of symptoms, benefits of medication outweigh harm, less restrictive services found inappropriate).

Upon close examination, then, Petitioners have not established that the decision reached by the Illinois Supreme Court to uphold section 2-107.1 on its face conflicts with the decisions of this Court or a decision of another state court of last resort. Sup. Ct. Rule 10.1(b). For this reason as well, review is not warranted, and this Court should deny the petition.

IV.

PETITIONERS HAVE NOT MET EVEN THE THRESHOLD OF ESTABLISHING AN EQUAL PROTECTION VIOLATION BECAUSE SECTION 2-107.1 SUBJECTS ALL DECISIONS REGARDING THE INVOLUNTARY ADMINISTRATION OF PSYCHOTROPIC MEDICATIONS TO ITS PROVISIONS.

The flaw in Petitioners' equal protection argument is in its premise: They assume that persons for whom a court order is sought under section 2-107.1 is similarly situated, for equal protection purposes, to a person for whom guardianship is sought. (Petition at 25-26) The equal protection clause requires the state to treat similarly situated persons in a similar manner. *City of Cleburne v. Cle-*

burne Living Center, Inc., 473 U.S. 432, 439 (1985). The equal protection clause does not, however, deny a state the power to draw lines that treat different classes of persons differently. *Nordlinger v. Hahn*, ____ U.S. ____, 112 S. Ct. 2326, 2331 (1992). Thus, to establish an equal protection violation a person must show that a statute arbitrarily discriminates against that person by withholding some benefit or privilege the state gives to all others similarly situated. *Id.*

Significantly, section 2-107.1 does not draw a distinction between recipients of services who have guardians appointed and those who do not. Instead, the statute subjects all decisions involving the involuntary administration of psychotropic medications to the procedures and standards set forth therein. *See* P.A. 89-11, § 5 (Resp. App. A-2–A-3).

Moreover, the fact that persons subject to the involuntary administration of psychotropic medications under section 2-107.1 and persons subject to guardianship lack the capacity to make certain types of decisions is not determinative. The types and extent of the incapacities involved and the nature of the decisions distinguish these two classes of persons. The guardianship system is not designed to address the frequently transitory nature of the mental illnesses that require treatment with psychotropic medications. Many individuals who either are not, or have not been adjudicated, legally disabled may nonetheless lack the capacity, at least for limited periods of time, to make treatment decisions. Yet, for other purposes, and for other periods of time, those individuals may be capable of making decisions and thus not qualify under the standards for appointing a guardian.

The legislature is not prohibited from providing distinct procedures and standards for persons who are uniquely

situated and constitute a distinct category of persons from those adjudicated legally incompetent or from drawing classifications that rationally correspond to legitimate legislative purposes. *See Heller v. Doe*, ____ U.S. ____, 113 S. Ct. 2637 (1993). Therefore, Petitioners have not shown that section 2-107.1 deprives them of equal protection. There is no basis of error warranting this Court's review.

CONCLUSION

For all of the foregoing reasons, the Court should deny the Petition for Writ of Certiorari to the Illinois Supreme Court.

Respectfully submitted,

JAMES E. RYAN
Attorney General of Illinois

BARBARA A. PREINER
Solicitor General of Illinois

RITA M. NOVAK
Counsel of Record
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5659

Attorneys for Respondent

APPENDIX

PUBLIC ACT 89-11

AN ACT to amend the Mental Health and Developmental Disabilities Code by changing Section 2-107.1.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Mental Health and Developmental Disabilities Code is amended by changing Section 2-107.1 as follows:

(405 ILCS 5/2-107.1) (from Ch. 91 1/2, par. 2-107.1)

Sec. 2-107.1. Administration of psychotropic medication upon application to a court.

(a) Notwithstanding the provisions of Section 2-107 of this Act, psychotropic medication may be administered to a recipient of services against his will under the following standards ~~and procedures of this Section~~:

(1) ~~(a)~~ Any person 18 years of age or older, including any guardian, may petition the circuit court for an order authorizing the administration of psychotropic medication to a recipient of services.

(2) ~~(b)~~ The court shall hold a hearing within 30 days of the filing of the petition.

(3) ~~(c)~~ Unless otherwise provided herein, the procedures set forth in Article VIII of Chapter 3 of this Act, including the provisions regarding appointment of counsel, shall govern hearings held under this subsection (a) ~~Section~~.

(4) ~~(d)~~ Psychotropic medication shall not be administered to the recipient unless it has been determined by clear and convincing evidence that all of the following factors are present:

(A) ~~(1)~~ That the recipient has a serious mental illness or developmental disability.

(B) ~~(2)~~ That because of said mental illness or developmental disability, the recipient exhibits deterioration of his ability to function, suffering, or threatening or disruptive behavior.

(C) ~~(3)~~ That the illness or disability has existed for a period marked by the continuing presence of the symptoms set forth in item (B) ~~paragraph (2) of subsection (d)~~ of this subdivision (4) ~~Section~~ or the repeated episodic occurrence of these symptoms.

(D) ~~(4)~~ That the benefits of the psychotropic medication will outweigh the harm.

(E) ~~(5)~~ That the recipient lacks the capacity to make a reasoned decision about the medication.

(F) ~~(6)~~ That other less restrictive services have been explored and found inappropriate.

(5) ~~(e)~~ In no event shall an order issued under this Section be effective for more than 90 days. However, psychotropic medication may be administered for additional 90-day periods without limitation under hearings that comply with the above standards and procedures of this subsection (a) ~~Section~~.

(6) ~~(f)~~ An order issued under this subsection (a) ~~Section~~ shall designate the persons authorized to administer the psychotropic medication under the standards and procedures of this subsection (a) ~~Section~~.

(b) ~~(g)~~ A guardian may ~~shall only~~ be authorized to consent to the administration of psychotropic medication to an objecting recipient only under the standards and procedures of subsection (a) ~~this Section~~.

(c) Notwithstanding any other provision of the Section, a guardian may consent to the administration of psychotropic medication to a non-objecting recipient under Article XIa of the Probate Act of 1975.

(d) ~~(h)~~ Nothing in this Section shall prevent the administration of psychotropic medication to recipients in an emergency under Section 2-107 of this Act.

(Source: P.A. 87-124.)

Section 99. Effective date. This Act takes effect upon becoming law.

President of the Senate

Speaker, House of Representatives

APPROVED

this 31st day of March 1995 A.D.

Jim Edgar

GOVERNOR

Supreme Court, U.S.
FILED
MAY 9 1995
OFFICE OF THE CLERK

No. 94-1164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

C.E. and L.E.,

Petitioners,

v.

ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

REPLY BRIEF FOR PETITIONERS

JOHN B. LOWER
General Counsel
WILLIAM E. COFFIN
Counsel of Record
JEFFREY M. PLESKO
Illinois Guardianship and Advocacy Commission
160 North LaSalle Street
Suite S-500
Chicago, Illinois 60601
(312) 793-5908

Counsel for Petitioner C.E.

MARK B. EPSTEIN
Epstein & Epstein
134 North LaSalle Street
Suite 2106
Chicago, Illinois 60602
(312) 782-3193

Counsel for Petitioner L.E.

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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REPLY BRIEF FOR PETITIONERS

I.

THIS COURT HAS JURISDICTION PURSUANT TO SECTION 1257(a) BECAUSE ALL FEDERAL ISSUES HAVE BEEN FINALLY DETERMINED BY THE ILLINOIS SUPREME COURT, NO FURTHER EFFECTIVE REVIEW IS AVAILABLE IN THE STATE COURTS, AND A DELAY IN THIS COURT'S REVIEW WOULD RESULT IN THE SERIOUS EROSION OF THE FEDERAL POLICY PROTECTING THE CONSTITUTIONAL RIGHT TO REFUSE UNWANTED MEDICAL TREATMENT.

In determining whether a state court's decision is final, despite anticipated additional proceedings, this Court has adopted a practical, rather than a technical, ap-

proach, and has balanced the inconvenience and costs of piecemeal review, on the one hand, against the "danger of denying justice by delay," on the other. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 478 (1974). Both of these practical considerations militate in favor of a finding of finality in this case.

Review by this Court at this time creates no risk of piecemeal review. The constitutionality of Section 2-107.1 was challenged in petitions for declaratory relief filed by L.E. and C.E. Under Illinois law, a petition for declaratory relief creates an independent cause of action, and a declaration of rights is not to be made unless doing so terminates the entire controversy between the parties or some part thereof. 735 ILCS 5/2-701 (West 1992). The Illinois Supreme Court's decision on L.E.'s and C.E.'s petitions for declaratory relief resolved the distinct issue of the statute's constitutionality and terminated the controversy in the state courts on that issue.

In *Construction Laborers v. Curry*, 371 U.S. 542 (1962), even though further proceedings were pending in the state courts, this Court took jurisdiction to review a state's decision that its courts had authority to enjoin labor union picketing. Similarly, this Court may take jurisdiction to review Illinois's decision that its courts have authority to order non-emergency involuntary psychotropic medication. Like *Curry*, this case presents "multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled." *Curry*, 371 U.S. at 549.

The only issue to be decided on remand is one of state law: does C.E. meet the statutory prerequisites of Section 2-107.1? Respondent's claim that additional federal

issues may arise on remand is based on a misreading of the Illinois Supreme Court's opinion. Respondent repeatedly asserts that the Illinois Supreme Court held that trial courts "must" consider the patient's competent wishes before ordering psychotropic medication under Section 2-107.1. (Opp. 7, 10, 11 and 15) These assertions are not true. Instead, the court held that Section 2-107.1 merely "permits" consideration of the patient's competent wishes and that these wishes "will often be highly pertinent" when assessing whether the medication's benefits outweigh its risks. (App. A-19 and A-18)

Based upon its misapprehension, Respondent posits that further state court proceedings could give rise to additional constitutional issues if, for example, the trial court "wholly ignores C.E.'s wishes while competent." (Opp. 11) Because the Illinois Supreme Court did not hold that consideration of the patient's wishes is *required* and did not hold that, even if considered, the patient's wishes would be *determinative* of the hearing's outcome, according to the court, no constitutional violation occurs if the trial court ignores the patient's wishes.

Respondent also posits that additional constitutional issues will arise on remand if the trial court concludes that there is no evidence showing what C.E.'s competent wishes would be. (Opp. 11) The Illinois Supreme Court, however, has addressed this scenario as well and has ruled that the trial court, when lacking evidence of substituted judgment, should apply the best interests standard. (App. A-21)

The only federal questions at issue in this case have been finally decided by the Illinois Supreme Court, and that court's decision is not subject to review or alteration

by the state courts. The Illinois Supreme Court shunned the opportunity to alter or clarify its opinion when it denied C.E.'s Petition for Rehearing (App. C-1), and principles of *res judicata* bar any further review in the state courts. Thus, this Court may take jurisdiction of this case now without risking piecemeal review of federal issues.

Moreover, this Court's refusal to review this case at this time would create a "danger of denying justice by delay." In 1981, this Court recognized that the substantive contours of the right to refuse unwanted psychotropic medication had not been clearly defined, *Mills v. Rogers*, 457 U.S. 291 (1982), and they have not been clearly defined to this day. *Sherman v. Four County Counseling Center*, 987 F.2d 397 (7th Cir. 1993). Lacking direction from the federal courts, the Illinois legislature enacted Section 2-107.1 in August 1991, and L.E. first challenged its constitutionality that same month. A decision by this Court would end decades of confusion for this nation's courts, and a reversal would end nearly four years of litigation for L.E. and C.E.

Review by this Court at this time is the only way to effectively protect C.E.'s constitutional rights. Those rights include the right not to be subjected to a court hearing at which his right to refuse unwanted, non-emergency psychotropic medication is put into jeopardy.[1] If

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[1] In appeals from the Circuit Courts of Appeals, this Court has recognized the collateral order exception to the final judgment rule. This exception allows the Court to review a pre-trial order denying dismissal of an indictment on double jeopardy or speech or debate grounds. Such a pre-trial order affects the defendant's right "not to be tried"—a right which

(continued...)

this Court refuses to review this case, the Illinois Supreme Court's decision would subject C.E. and countless other persons with mental illnesses and developmental disabilities to hearings for the involuntary administration of non-emergency psychotropic medication—hearings which, if Section 2-107.1 is unconstitutional, should never be held at all. *See Cox*, 420 U.S. at 485.

Additionally, a refusal to review the state court decision would erode the federal policy of protecting the individual's right to determine his/her own medical care. This policy is evidenced by this Court's opinions in *Riggins v. Nevada*, 112 S. Ct. 1810 (1992), *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), and *Washington v. Harper*, 494 U.S. 210 (1990), and by Congress's enactment of the Patient Self-Determination Act, 42 U.S.C. sec. 1395cc(a)(1).

The cases cited by Respondent to defeat this Court's jurisdiction are not applicable here. This Court refused to exercise its jurisdiction in *Flynt v. Ohio* because there was "no identifiable federal policy" at risk. *Flynt v. Ohio*, 451 U.S. 619, 622 (1981). Similarly, this Court refused to exercise its jurisdiction in *Republic Natural Gas Co. v. Oklahoma* because the state court's decision rested "on matters peculiarly of local concern." *Republic Gas v. Oklahoma*, 334 U.S. 62, 67 (1948). In contrast, if left un-

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[1] (...continued)
would be "irretrievably lost if review were postponed until trial is completed." *Flanagan v. U.S.*, 465 U.S. 259 (1983). *See also Cox*, 420 U.S. at 482 (because important rights may be irreparably lost, review after the termination of the litigation may not be effective) (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)).

reviewed, the Illinois Supreme Court's opinion in this case would seriously erode the federal policy protecting an individual's right of self-determination, and the important federal issue presented here may escape review entirely. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1988) (review undertaken to remove doubt about RICO's seizure provisions); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1987) (unreviewed decision by Ohio Supreme Court would erode federal regulation of nuclear production facilities); *Southland Corp. v. Keating*, 465 U.S. 1 (1983) (California Supreme Court decision reviewed to uphold federal policy in favor of right to contract).

II.

THE RECORD IS SUFFICIENTLY DEVELOPED TO ALLOW RESOLUTION OF THE CONSTITUTIONAL ISSUES RULED UPON BY THE ILLINOIS SUPREME COURT.

Respondent argues that the "lack of a factual record" makes the Court's exercise of its jurisdiction inappropriate at this time. (Opp. 13) Such an argument is tantamount to suggesting a *per se* rule that this Court will not review facial challenges to statutes brought in petitions for declaratory relief. Plainly, this Court follows no such rule. *See eg. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1973); *Hudson Distributors v. Eli Lilly*, 377 U.S. 386 (1963).

Rescue Army v. Municipal Court, 331 U.S. 549 (1947), relied on by Respondent, is distinguishable from the present case. There this Court declined to review the constitutional validity of city ordinances governing the solicitation of charitable contributions because, *inter alia*,

the record did not reveal which provisions had been used to charge the petitioner nor which provisions were being challenged and because the state court had not yet interpreted the ordinances. *Rescue Army*, 331 U.S. at 576-578.

In contrast, Section 2-107.1 has been interpreted by the Illinois Supreme Court and its constitutional validity upheld. No additional facts are needed for this Court to review the Due Process and Equal Protection infirmities raised by Petitioners.

III.

THIS COURT SHOULD GRANT THE PETITION IN ORDER TO ESTABLISH THE SUBSTANTIVE CONTOURS OF THE CONSTITUTIONAL RIGHT TO REFUSE PSYCHOTROPIC MEDICATION, RESOLVE THE SPLIT AMONG THE CIRCUIT COURTS OF APPEALS, AND RESOLVE THE CONFLICT BETWEEN THE ILLINOIS SUPREME COURT'S OPINION AND *O'CONNOR*, *CRUZAN*, AND *ROE*.

Respondent cannot deny that this case presents an important federal question, *see Mills v. Rogers*, 457 U.S. 291 (1982), and Respondent cannot deny that the Circuit Courts of Appeals have issued conflicting opinions regarding the contours of the constitutional right to refuse psychotropic medication. *See Sherman v. Four County Counseling Center*, 987 F.2d 397 (7th Cir. 1993). Respondent's silence on these issues is stark evidence that this Court should grant the petition in this case. Respondent contends that the petition should nonetheless be denied because this case presents no conflict with opinions of this Court or of any state supreme court. Respondent, however, is mistaken.

This Court has held that there is no constitutional basis for involuntarily confining persons with mental illnesses if they are not dangerous and can survive safely in freedom. *O'Connor v. Donaldson*, 422 U.S. 563 (1975), *construed in Zinermon v. Burch*, 494 U.S. 113, 133 (1990). Because states cannot deprive non-dangerous persons of their liberty by involuntarily confining them, it follows that states cannot deprive non-dangerous persons of their liberty by involuntarily medicating them. In this case, the Illinois Supreme Court upheld the involuntary administration of mental health and developmental disability services to persons who are not dangerous, and its opinion conflicts with *O'Connor*.

The Massachusetts Supreme Court has held that psychotropic medication may be involuntarily administered to a person who lacks decisional capacity only "where a judicial substituted judgment determination indicates that the incompetent individual would, if competent, accept [such] drugs." *In the Matter of Guardianship of Roe*, 383 Mass. 415, 453, 421 N.E.2d 40, 61 (1981). Similarly, this Court has held that Due Process requires the state to repose judgment regarding medical treatment with the patient himself and not with anyone else. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 286 (1990). In the present case, the Illinois Supreme Court allowed, but did not require, the state's trial courts to repose medical judgments with the patient by allowing the trial courts to use the substituted judgment standard. Because the court did not *require* use of the substituted judgment standard, its opinion conflicts with *Roe* and *Cruzan*.

IV.

THIS COURT SHOULD GRANT THE PETITION IN ORDER TO CORRECT THE ILLINOIS SUPREME COURT'S DECISION; THE CREATION OF TWO DISPARATE JUDICIAL PROCEDURES TO MAKE TREATMENT DECISIONS FOR PERSONS WHO LACK DECISIONAL CAPACITY VIOLATES THE EQUAL PROTECTION CLAUSE.

Respondent claims that Petitioners' Equal Protection argument rests on a flawed premise: "that persons for whom a court order is sought under Section 2-107.1 is [sic] similarly situated, for equal protection purposes, to a person for whom guardianship is sought." (Opp. 21) Petitioners' premise, however, is not flawed. The Illinois Supreme Court found that 2-107.1's requirement that recipients lack the capacity to make reasoned decisions "bears substantial similarity" to the guardianship statute's definition of a disabled person. (App. A-30) Thus, for purposes of Equal Protection, persons subjected to 2-107.1 hearings are similarly situated to persons subjected to guardianship hearings. Section 2-107.1 violates Equal Protection because, created to avoid the guardianship statute, it is an inferior alternative for making treatment decisions for persons who may lack decisional capacity.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

JOHN B. LOWER
General Counsel
WILLIAM E. COFFIN
Counsel of Record
JEFFREY M. PLESKO
Illinois Guardianship and
Advocacy Commission
160 North LaSalle Street
Suite S-500
Chicago, Illinois 60601
(312) 793-5908

Counsel for
Petitioner C.E.

MARK B. EPSTEIN
Epstein & Epstein
134 North LaSalle Street
Suite 2106
Chicago, Illinois 60602
(312) 782-3193

Counsel for
Petitioner L.E.